IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

VIRGIL BAKER,

Plaintiff,

v.

DONNA E. SHALALA,
Secretary of HHS,

Defendant.

Case No. 93-C-698-B Wolfe ✓

ORDER

Now before the Court is Virgil Baker's appeal of a decision by the Secretary of Health and Human Services to deny him Social Security disability benefits.[1] The chief issue is whether substantial evidence supports the Secretary's decision. In addition, Baker asserts three other issues: (1) The Administrative Law Judge ("ALJ") violated the "treating physician" rule; (2) The ALJ erred in his hypothetical questioning of the vocational expert and (3) The ALJ did not properly analyze Baker's subjective complaints of pain. After reviewing each of Baker's arguments, the Court affirms the Secretary's decision of no disability.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is

[1] *In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

supported by substantial evidence." ***Campbell*** *v. Bowen*, 822 F.2d 1518, 1521 (10th Cir.1987). Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. ***Smith*** *v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).

Keeping those standards of review in mind, a claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in Appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In the case at bar, Baker applied for disability benefits, alleging that he was unable to work because of "chest pain." During the hearing, Baker also testified that he had diabetes and other assorted health problems.[2]

After a hearing, the ALJ found that Baker was not disabled under the Social Security Act. At step 4, the ALJ concluded that Baker could not return to his past relevant work as a cross-country truck driver. However, at step 5, the ALJ found that Baker could do "light" work such as a baggage handler, a bench assembler, and a cashier at a public

[2] *On page 2 of his Brief, Baker lists his ailments: "Testimony at the hearing shows that Plaintiff had diabetes, and had cardiac related chest pain, and treated for diabetes with visual retinopathy; he had lost feeling in his feet and had sores on his legs...[had] experienced fatigue, diarrhea and back pain."*

parking lot. Baker challenges that finding, arguing that he is disabled under the Social Security Act.

II. Legal Analysis

Baker, who has a seventh-grade education and was born in 1941, raises three issues on appeal: (1) The ALJ violated the "treating physician" rule; (2) The ALJ erred in his hypothetical questioning of the vocational expert; and (3) The ALJ improperly analyzed Baker's complaints of pain.

A. The Treating Physician Rule

The treating physician rule requires the ALJ to give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).[3]

In this case, Baker argues that the ALJ did not give proper weight to Dr. Daniel K. Wooster. Dr. Wooster, a treating physician from October of 1989 until August of 1992, wrote on April 19, 1990 that Baker could no longer work as a truck driver. *Record at 283.* And, in a August 26, 1992 letter, Dr. Wooster wrote:

> I would suggest that Mr. Baker be considered strongly for full disability...Mr. Baker has significant coronary artery disease and, due to this, he certainly should not be operating any hazardous machinery or be involved in any work that would put someone in jeopardy in case he should have a sudden event. Also due to his multiple medical problems, he probably could not hold up at any job that requires more than minimal physical effort and probably is

[3] *The treating physician rule governs the weight to be accorded the medical opinion of the physician who treated the claimant...relevant to other medical evidence before the fact-finder, including opinions of other physicians. The rule...provides that a treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment is (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder.* Kemp v. Bowen, *816 F.2d 1469, 1476 (10th Cir. 1987).*

limited to only half days of work, if any. *Id. at 445.*

As the aforementioned rule states, the ALJ must give substantial weight to Dr. Wooster's conclusions or offer specific and legitimate reasons for discounting the opinion.

On page 24 of the Record, the ALJ writes that "the basis upon which Dr. Wooster has set forth his opinion appears to be only the exaggerated symptoms. The objective findings and the medical evidence do not support the significance of impairment implied by Dr. Wooster. Accordingly, Dr. Wooster's opinion cannot be given much weight. Dr. Wooster's own medical records do not support his findings." Such reasons, as listed by the ALJ, are specific and legitimate. See, *Edwards v. Sullivan*, 937 F.2d 580, 583 (11th Cir. 1991)("The treating physician's report may be discounted when it is not accompanied by objective medical evidence or is wholly conclusory.") Consequently, the ALJ did not err on this issue.[4]

B. The ALJ's Hypothetical Questioning

Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). Precision is not defined but, at a minimum, uncontradicted expert conclusions corroborated by evidence must be included in the hypothetical. *Ekeland v. Bowen*, 899 F. 2d 719, 722 (8th Cir. 1990).

Here, Baker contends that "unrebutted evidence" showed that he suffered from depression and was given anti-depressant medication. Consequently, Baker argues the ALJ

[4] *Whether substantial evidence supports the ALJ's decision will be discussed later.*

erred because he did not include these "non-exertional" impairments in the hypothetical.[5] Baker also asserts that the vocational expert was not "fully knowledgeable" on the issues surrounding his claim.

The Court finds Baker's argument to be without merit. First, the "unrebutted evidence" discussed by Baker comes from Dr. Wooster's April 19, 1990 letter. As mentioned earlier, Dr. Wooster's opinion was properly discounted by the ALJ, making his finding of limited value on this issue. Second, and most importantly, the record indicates that Baker never sought psychiatric or psychological treatment during the time frame in question. In addition, no medical evidence other than Wooster's letter mentions Baker's "depression." Therefore, the ALJ did not err when he left "depression" out of the hypothetical question. The hypothetical question was proper.

C. ALJ's Evaluation of Baker's Pain Complaints

The rule on evaluating complaints of pain is examined in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). The ALJ must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the ALJ must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If these two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id. at 163-164.*

The record suggests that the ALJ determined that a nexus existed between Baker's impairments and his subjective allegations of pain. *See, Record at 26 ("ALJ recognizes that*

[5] *Baker's argument concerning the vocational expert also is without merit. As noted by the Secretary, the vocational expert discussed positions available at the light and sedentary work level.*

the claimant may experience some degree of pain and discomfort.") But the ALJ -- after analyzing several of the factors discussed in *Luna, supra,*[6] found that "neither the objective medical evidence nor the testimony of the claimant establishes the ability to function has been so severely impaired as to preclude all types of work activity." *Id.* The ALJ also noted that Baker's daily activities "are not those of someone disabled by disabling or debilitating pain." *Id.* Given the ALJ's reasoning, this issue is also without merit.

D. Does Substantial Evidence Support the ALJ's Finding?

Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987).[7] A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan,* 966 F.2d 1326 (10th Cir. 1992).

The primary items of evidence before the ALJ were: (1) Baker's testimony; (2) the vocational expert's testimony; (3) The reports of Dr. Wooster, the aforementioned treating physician; (4) The reports of Dr. Don Dunaway, a consulting physician; (5) Dr. Paul

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[6] *In Luna, the Tenth Circuit explained how such pain can be evaluated by the ALJ: "In previous cases, we have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problem. [Other] factors for consideration [are] the claimant's daily activities, and the dosage, effectiveness and side effects of medication." Id. at 166. In this case, on pages 26 and 27 of the Record, the ALJ discussed Baker's medication and his daily activities. In addition, his visits to various physicians was discussed throughout the ALJ's decision.*

[7] *One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).*

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Krautter, a consulting physician; and (6) Dr. James Higgins.

Dr. Krautter examined Baker on March 16, 1992, noting that he was 5'8" and 228 pounds. He diagnosed Baker with ***diabetic neuropathy, history of diabetic retinopathy, COPD, chronic back pain, hyperlipidemia, chronic dyspepsia and a prior history of alcoholism.*** *Record at 428-429.* Dr. Knautter, however, found that Baker was"otherwise neurologically normal." *Id.* The findings of Dr. Dunaway were similar.

Mr. Baker testified that he has pain in his shoulders, back and legs.[8] He says he takes several types of medication, including insulin. Mr. Baker also testified that his daily activities include sweeping the floor, vacuuming, folding laundry, occasionally shopping for groceries, reads and watches television. He also told Dr. Dunaway he could walk up to a mile.

Charles Hunter, the Vocational Expert, testified that Mr. Baker could not return to his past job as a truck driver. Hunter also testified that Baker could work as a hand packager/bagger, bench assembler, and as cashier at a public parking lot or toll road. Upon questioning from Baker's representative, Mr. Hunter acknowledged that Mr. Baker may have problems doing certain jobs. However, that, in itself, is not dispositive. Those questions were based on all of Baker's alleged impairments -- not the ones supported by substantial evidence.

As noted earlier, this court does not review the ALJ decision *de novo.* As factfinder, the ALJ has the responsibility to weighing and determining the credibility of evidence. In

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[8] *Baker also testified to the following: that he suffers from chest pain, that he has vision problems, that he takes insulin, that he has problems with swelling and pain in his feet and legs and that he was previously an alcoholic.*

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this case, the ALJ based his findings on the testimony of the Vocational Expert, the reports of Drs. Dunaway and Krautter and on Baker's own testimony concerning his daily activities. The ALJ further discounted the evidence submitted by Dr. Wooster and adjudged part of Mr. Baker's testimony to not be credible. As a result, the court finds that substantial evidence supports the ALJ's decision of no disability.[9] As a result, the Court AFFIRMS the Secretary's decision.

SO ORDERED THIS 30th day of June, 1994.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

[9] *Baker argues the ALJ failed to take all of the medical evidence into consideration. However, an excerpt from the ALJ's opinion refutes that as the ALJ adequately reviewed the record. Writes the ALJ: "The ALJ finds based upon the objective medical evidence that claimant's diabetes, his chronic obstructive pulmonary disease, his history of laminectomies, and the resultant shortness of breath and chest pain will act to limit claimant to performing the wide range of light exertional activity. Claimant has full range of motion in his extremities. However, claimant's shortness of breath and his chest pain will act to reduce claimant's ability to work...There is nothing in the medical record that indicates that claimant cannot perform light exertional activity. Claimant can lift at least 20 pounds. Claimant will be limited to performing only a good deal of walking or standing. This is because of claimant's diabetic neuropathy and his back pain. The claimant can sit most of the time. There is no indication that claimant could not operate push and pull arm and leg controls. The ALJ finds that claimant an perform light work, restricted by limits on claimant's ability to perform extended walking or standing activity." Record at 25.*

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FILED

SEP 30 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LORI G. McKENZIE,

Plaintiff,

vs.

RENBERG'S, INC., and ROBERT L. RENBERG,

Defendants.

Case No. 92-C-398-B

ENTERED ON DOCKET
DATE 9-30-94

JUDGMENT

Pursuant to the Order granting judgment as a matter of law to the Defendants, Renberg's, Inc. and Robert L. Renberg, and against the Plaintiff, Lori G. McKenzie, filed this date, Judgment is hereby entered in favor of Renberg's, Inc. and Robert L. Renberg and against the Plaintiff, Lori G. McKenzie, and Plaintiff's action is hereby dismissed. Costs are hereby granted in favor of the Defendants and against the Plaintiff, if timely applied for pursuant to Local Rule 54.1, and the parties are to pay their own respective attorneys fees.

DATED this 30th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LORI G. McKENZIE,

Plaintiff,

vs.

RENBERG'S, INC., and ROBERT L. RENBERG,

Defendants.

Case No. 92-C-398-B

O R D E R

The Court has for decision the motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50, or alternatively a motion for new trial pursuant to Fed.R.Civ.P. 59 (Docket #108) of the Defendants, Renberg's, Inc. and Robert L. Renberg.

The judgment herein for the Plaintiff, Lori G. McKenzie ("McKenzie"), in the amount of $103,966.00, was entered after a jury verdict finding Plaintiff's employment was terminated by Defendants on September 20, 1991, due to retaliation in violation of 29 U.S.C. § 215(a)(3) of the Fair Labor Standards Act ("FLSA").[1]

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[1] 29 U.S.C. § 215 **Prohibited acts; prima facie evidence**

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

* * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; * * *"

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Plaintiff, as personnel director of Defendant, Renberg's, Inc. (retail clothing business), following attendance at an FLSA-related seminar, had raised the issue approximately three weeks before her termination that perhaps certain management and/or commissioned sales employees were being denied overtime compensation in violation of the FLSA. The parties agreed that discharging the Plaintiff for said conduct would be a violation of 29 U.S.C. § 215(a)(3).

As nonpretextual legitimate reasons for Plaintiff's termination, Defendants offered evidence that Plaintiff, as personnel director, had improperly disclosed confidential information, and additionally, had participated in notarizing a written *quid pro quo* employment-related contract for sexual favors. The Defendants deny that Plaintiff, an at-will employee, was discharged in retaliation for her raising the FLSA matter.

Concerning an employee disseminating confidential information, even when done in support of a discrimination charge, numerous cases have found that this and disloyalty is a legitimate reason for employee discharge. Jefferies v. Harris Cty. Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980); O'Day v. McDonnell Douglas Helicopter Co., 784 F.Supp. 1466, 1470 (D.Ariz. 1992); Baker v. Georgia Power Co., 27 Fair Empl. Prac. Cas. (BNA) 1301 (N.D.Ga. 1980); Herrera v. Mobil Oil, Inc., 53 Fair Empl. Prac. Cas. (BNA) 1406 (W.D.Tex. 1990); and Hamm v. Members of the Board of Regents of the State of Florida, 708 F.2d 647, 653 (11th Cir. 1983).

Defendants also asserted defensively that the FLSA was integral to Plaintiff's job as personnel director, so any communications on the subject of the FLSA by Plaintiff could not be considered protected activity for purposes of a retaliation discharge claim. In support of this position, Defendants submit two law review articles: 35 S.Tex.L.Rev., No. 1, January 1994, p. 95, and B.C.L.Rev. Vol. 29:347. p. 391.

29 U.S.C. § 215(a)(3) protects all employees from being terminated for speaking up regarding good faith FLSA violations. This would include the Plaintiff as Renberg's, Inc., personnel director as well. Her position as personnel director should not be a *per se* exemption from § 215(a)(3) prohibition against a retaliatory discharge. *See*, Harris v. First National Bank of Hutchinson, Kansas, 680 F.Supp. 1489 (D.Kan. 1987); Harris v. Board of Public Util., 757 F.Supp. 1185 (D.Kan. 1991); and Francoeur v. Carroon & Black Company, 552 F.Supp. 403 (S.D.N.Y. 1982). Thus, the court concludes Plaintiff's conduct herein regarding reporting the possible FLSA violation is protected activity under § 215(a)(3).

In their motion for judgment as a matter of law, Defendants also assert that Plaintiff did not present evidence of pretext joining issue with Defendants' legitimate nondiscriminatory reasons for discharging Plaintiff. This failure, urged Defendants, entitles them to a judgment as a matter of law. Saint Mary's Honor Center v. Hicks, _____ U.S. _____, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 798 (10th Cir. 1993); Lovelace v. Sherwin-Williams Co.,

681 F.2d 230, 242 (4th Cir. 1982); and Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 600 (9th Cir. 1993). Thus, under Fed.R.Civ.P. 50, the court must determine from the record whether sufficient probative evidence exists to permit the trier of fact to decide the issue of pretext. Wright & Miller, Federal Practice & Procedure §2524 (1st ed. 1971).

Concerning Plaintiff's discharge due to retaliation in violation of 29 U.S.C. § 215(a)(3), for her good faith raising of possible FLSA violations, the Court does not consider it necessary to analyze in depth all of the trial evidence joining issue with Defendants' proffered legitimate nondiscriminatory reasons of Plaintiff's breaches of confidential information as pretextual.[2] Suffice it to say that when all of the evidence is viewed in a light favorable to Plaintiff, and all reasonable inferences are granted thereto, the evidence is sufficient to submit the issue to the trier of fact.[3] The more compelling fact in this regard is the timing of Plaintiff's discharge being two to three weeks following her suggesting to Renberg's, Inc., management that perhaps there were FLSA violations. In the recent case of Candelaria v. E G & G Energy Measurements, Inc., 1994 WL 474233 (10th Cir. 1994), the

[2]As long as the employee's protected activity complaint is in good faith, although centered in a mistake of fact, the employer is not permitted to retaliate. Love v. Re/Max of America, Inc., 738 F.2d 383, 385 (10th Cir. 1984).

[3]This is even in the face of Plaintiff's testimony that she had no evidence to refute that reasons given for her discharge were based on Defendant Robert L. Renberg's good faith reasonable belief that Plaintiff had engaged in employment-related misconduct (Tr. 178).

the court stated:

> "We are mindful that a retaliatory motive can be inferred from the fact that an adverse employment action follows charges by an employee against his/her employer. Such an inference can only be made, however, where 'close temporal proximity' exists between the bringing of charges and the subsequent adverse action. Smith v. Maschner, 899 F.2d 940, 948-49 (10th Cir. 1990)...."

See also, Miller v. Fairchild Industries, Inc., 797 F.2d 727, 731-33 (9th Cir. 1986), McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979), and Harris v. Fleming, 839 F.2d 1232, 1236-38 (7th Cir. 1988).

However, the evidence regarding Plaintiff's participation in the written *quid pro quo* contract for sexual favors presents a different matter. If this nonpretextual reason standing alone would support employment termination, a judgment as a matter of law is appropriate even though a factual issue exists regarding alleged retaliation pursuant to 29 U.S.C. § 215(a)(3). Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

The relevant evidence concerning the *quid pro quo* sexual favor contract is as follows: In 1989, Plaintiff was the Renberg's, Inc., personnel director. As such, it was her job function to be involved with the hiring of retail sales personnel and she was the Renberg's, Inc., affirmative action officer concerning sexual discrimination and harassment. Plaintiff was also a notary public, and notarized Defendants' Exhibit 1 which states as follows:

"September 26, 1989

Brenda Jagels
Dean Witter Reynolds
100 West 5th
Suite 600
Tulsa, OK 74103

Dear Brenda,

The purpose of this letter is to outline the terms of the agreement we reached in conversation Monday night September 25, 1989.

"AREA OF CONTENTION: Renberg's Christmas Bonus

TERMS OF THE AGREEMENT: Should Christmas bonuses not be paid in their usual manner to the employees of Renberg's, Inc., a company operating in Tulsa, Oklahoma, then David Childers will provide Brenda Jagels with the following:

(1) Fendi Parfum 1/4 oz
(1) Fendi EDT
(1) Fendi Body Lotion or Creme
(1) Erno Laszlo Eye Creme

However, should Christmas bonuses be paid then Brenda Jagels will provide David Childers with a very special and provocatively intimate evening; time, place and duration to be negotiated.

PAYMENT: Made on or before December 25, 1989."

Brenda, this letter is intended to be a binding contract. Please signify your agreement with the foregoing provisions by signing below and returning one copy for my file.

Sincerely,

/s/ David R. Childers
311 South Main
Tulsa, OK 74103

Accepted and agreed to this _____ day of _____, 1989.

/s/ Brenda S. Jagels
Brenda Jagels

Witnessed before me on this the
27 day of September, 1989.

/s/ Lori G. McKenzie
My commission expires _____, 198___."
(month, date and year unclear).

David R. Childers, at the time of Defendants' Exhibit 1, was a Renberg's, Inc., retail clothing store manager who was seeing Brenda Jagels socially. Brenda Jagels was a former Renberg's, Inc. employee who was an "on-call" Renberg's, Inc., employee during the holiday season.

In August 1991, David R. Childers ceased employment with Renberg's, Inc., and moved to the state of Washington. When Childers' Renberg's, Inc., desk was cleaned out, Defendants' Exhibit 1 was found therein. Robert Renberg testified that in late August or early September 1991, Defendants' Exhibit 1 was brought to his attention. In addition to Plaintiff's breaches of confidential personnel information, Robert Renberg concluded that Plaintiff's involvement with Defendants' Exhibit 1, an employee *quid pro quo* sexual favor contract, was also justification for Plaintiff's discharge. When Robert Renberg terminated Plaintiff on September 20, 1991, he advised her he was discharging her as an employee because he had lost confidence in her.

Clearly, Defendants' Exhibit 1 alludes to a type of *quid pro quo* employee sexual favor contract that is condemned by Title VII, 42 U.S.C. § 2000(e) *et seq*; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986).

The facts that Childers and Jagels signed Defendants' Exhibit

1, and that it was notarized before Plaintiff in the latter part of September, 1989, were undisputed. In Plaintiff's deposition she admitted reading Defendants' Exhibit 1 before she notarized it. (Tr. 191-192). At trial Plaintiff recanted her deposition testimony and said she had misunderstood the question, thinking the question was whether she had read Defendants' Exhibit 1 before at any time. (Tr. 191). In a filing with the court prior to trial, Plaintiff said, "Further Plaintiff admits that she read the document that she notarized but there was no evidence that Plaintiff approved of such contents of the document, only that she witnessed that two individuals signed a private noncompany-related document." (Tr. 193). It is disingenuous to assert that Defendants' Exhibit 1 is not company related when it proposes to exchange a company Christmas bonus for "a very special and provocatively intimate evening."

Concerning Defendants' Exhibit 1, Plaintiff testified as follows:

"Q. Now, in September of 1989, at that point you were the personnel director?

A. At what point?

Q. September of 1989.

A. Yes, I was.

Q. You weren't an assistant personnel director; you were the personnel director?

A. Yes.

Q. And wouldn't it be safe to assume that everybody in the company knew that?

A. Yes.

Q. And you were responsible for the company's obligations in employment matters, were you not?

A. Yes.

Q. And you were responsible regarding matters of sexual harassment, were you not?

A. Yes.

Q. It was part of your responsibility, was it not, to assure that there was a non-hostile work environment at the Renberg's stores, was it not?

A. Yes.

Q. And you were the person that if someone at the company felt they were a victim of harassment or a hostile work environment, they were supposed to come to you and tell you, right?

A. Yes.

Q. And when they came to you, then you were to investigate the matter and determine whether or not they had been harassed?

A. Yes.

Q. And if they had been harassed, you were to take care of the discipline on that?

A. Yes. (Tr. 181-183)

* * *

Q. Down here under the terms of the agreement under the 'however' paragraph it says, 'However, should Christmas bonuses be paid, then Brenda Jagels will provide David Childers with a very special, provocative, intimate evening, time, place and duration to be negotiated.'

Now, does not on its face of that exhibit, that's exchanging sexual favors for a Christmas bonus. It's on the face of the document.

A. That's what it says.

Q. So you agree with me on its face that would be an illegal agreement under the law.

A. Yes. She was not an employee, but --

Q. It doesn't say that, does it?

A. No, it doesn't.

Q. It says will pay a Christmas bonus, and if you get paid a Christmas bonus, basically I get you, right?

A. That's what it says. (Tr. 195).

* * *

Q. So whether a statement is serious or is a joke, it can have the same bad effects, can it not?

A. It could.

Q. And from a third-party standpoint, if they're offended it doesn't matter whether it's real or was a joke, does it?

A. True.

Q. So if you have someone other than Brenda out here, they could be offended by what they see happening in this instance, couldn't they?

A. Yes.

Q. And the mere fact that the parties to the transaction, who may find it acceptable, that still could impact another employee, couldn't it?

A. Yes.

Q. That could create -- be a part of what creates a hostile work environment for that third employee.

A. Yes.

Q. Call her Mary. Mary sees people having these kinds of agreements, she may believe she had a sexually charged work environment, may she not?

A. Yes.

Q. She's saying I'm not getting ahead, I'm not getting these Christmas bonuses because I'm not being signed up for these agreements.

A. We're not talking about an employee, though, in this agreement.

Q. You testified that she had been employed and was an on-call employee at this time.

A. Yes.

Q. And there is nothing on this agreement that says, oh, by the way, I'm not an employee of Renberg's.

A. No, it does not. (Tr. 186-187)

* * *

Q. But your signature is there, is it not?

A. Yes, it is.

Q. And everybody knows you're the personnel director.

A. Yes, they do.

Q. You don't cease being personnel director when you notarize something, do you?

A. No.

Q. And looking at that document, does it not concern you that if some other employee saw that, it would appear that the personnel director is endorsing that kind of document that you yourself believe is improper?

A. It could.

Q. And you understand that such a document as this could be very damaging to Renberg's in any litigation during a sexual harassment or sexual discrimination?

A. Yes.

Q. This could put the company at risk.

A. Yes.

Q. And you don't deny that you signed it?

A. No, I do not.

Q. You notarized this at work, right?

A. Yes, I did. (Tr. 189)

* * *

Q. Is there anything on the face of that contract that would indicate to Bob Renberg that you didn't read it?

A. No.

Q. Is there anything on the face of that document that would indicate to Bob Renberg that that was a joke?

A. No.

Q. Do you regreat (sic) that your signature is on there?

A. Yes, I do.

Q. Do you believe it was mistake that it was on there?

A. I did make a mistake signing it, yes.

Q. Do you have any reason to believe that Bob Renberg was not upset by this?

A. No.

Q. The mere passage of time doesn't make it any less wrong, does it?

A. No." (Tr. 190-191)

Because of a handwritten date on the top right corner of a copy of Defendants' Exhibit 1 (Plaintiff's Exhibit 13), Plaintiff asserted at trial that Robert Renberg did not learn of the *quid pro quo* sexual favor contract (Defendants' Exhibit 1) until October 1991, approximately a month after Plaintiff's discharge. However, the law of this circuit is clear that after-acquired information

that supports an employee's discharge may be relevant to uphold the employer's termination action. In Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, 706 (10th Cir. 1988), the court cited Blalock v. Metals Trades, Inc., 775 F.2d 703, 712 (6th Cir. 1985), which stated an employer could avoid liability under Title VII by showing "that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that, therefore, the discriminatory animus was not the cause of the adverse employment action." *See also*, O'Driscoll v. Hercules Inc., 12 F.3d 176, 178-79 (10th Cir. 1994), and Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1427 (10th Cir. 1993).

The testimony of Robert Renberg was that he was genuinely concerned with and could not condone Plaintiff's participation in Defendants' Exhibit 1. He testified that it was also a reason for Plaintiff's discharge. Plaintiff agreed that Robert Renberg, as president of Renberg's, Inc., could be expected to be upset over the implications of Defendants' Exhibit 1 for Renberg's, Inc. Even if Plaintiff did not read Defendants' Exhibit 1, as personnel director it was her job to supervise such personnel hiring arrangements and she was in charge of company affirmative action to prevent unlawful discrimination. Robert Renberg was within his rights as president of Renberg's, Inc., to discharge Plaintiff because of her involvement in notarizing Defendants' Exhibit 1.

For the reasons set forth above, the Defendants' motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50 is hereby SUSTAINED and the judgment entered herein in favor of Plaintiff

against the Defendants on the 19th day of July, 1994, is set aside. Defendants' alternative motion for new trial pursuant to Fed.R.Civ.P. 59 is, therefore, moot. Contemporaneous with the filing of this order a separate judgment is entered in favor of the Defendants, Renberg's, Inc. and Robert L. Renberg, and against the Plaintiff, Lori G. McKenzie.

DATED this 30th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JAMES E. COLE; BETTY COLE; STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION; STATE OF OKLAHOMA, ex rel, INSURANCE COMMISSION OF THE STATE OF OKLAHOMA, as Receiver for Quaker Life Insurance Company; COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P.; **COUNTY TREASURER,** Tulsa County, Oklahoma; **BOARD OF COUNTY COMMISSIONERS,** Tulsa County, Oklahoma,	)	FILED SEP 30 1994 DATE 9-30-94
Defendants.	)	CIVIL ACTION NO. 94-C-276-B

AMENDED ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Judgment of Foreclosure entered herein on the 22nd day of June, 1994, is vacated; and the sale now scheduled for the 26th day of September is canceled; and dismissed without prejudice.

Dated this 30th day of Sept., 1994.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

NBK:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JERRY A. LITTLEJOHN aka JERRY ALAN LITTLEJOHN; JANICE M. LITTLEJOHN aka JANICE MARIE LITTLEJOHN; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	ENTERED ON DOCKET DATE 9-30-94
Defendants.	)	CIVIL ACTION NO. 94-C 593B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30th day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, **Jerry a. Littlejohn aka Jerry Alan Littlejohn and Janice M. Littlejohn aka Janice Marie Littlejohn,**, appear not, but make default.

The Court being fully advised and having examined the court filed finds that the **Defendant, Jerry A. Littlejohn aka Jerry Alan Littlejohn,** will hereinafter be referred to as **("Jerry**

A. Littlejohn") and the Defendant, Janice M. Littlejohn aka Janice Marie Littlejohn, will hereinafter be referred to as ("Janice M. Littlejohn"). The Defendants, Jerry A. Littlejohn and Janice M. Littlejohn, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, Jerry A. Littlejohn and Janice M. Littlejohn, were served with copy of Summons and Complaint on July 12, 1994; and that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint via Certified Mail on June 10, 1994;

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on July 26, 1994; that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission , filed its Answer on July 5, 1994; and that the Defendants, Jerry A. Littlejohn and Janice M. Littlejohn, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Five (5), Block Nine (9), SUBURBAN ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 31, 1987, the Defendants, Jerry A. Littlejohn and Janice M. Littlejohn, executed and delivered to Mercury Mortgage Co., Inc., their mortgage note in the amount of $25,300.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Jerry A Littlejohn and Janice M. Littlejohn, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated August 31, 1987, covering the above-described property. Said mortgage was recorded on September 2, 1987, in Book 5049, Page 1557, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 7, 1988, MERCURY MORTGAGE CO., INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns.. This Assignment of Mortgage was recorded on September 8, 1988, in Book 5126, Page 2229, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1988, the Defendants, Jerry A. Littlejohn and Janice M. Littlejohn, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1990 and June 1, 1990.

The Court further finds that the Defendants, Jerry A. Littlejohn and Janice M. Littlejohn, filed their petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 89B-4121, on December 28, 1989; this bankruptcy was discharged on April 26, 1990 and closed on June 6, 1990.

The Court further finds that the Defendants, Jerry A. Littlejohn and Janice M. Littlejohn, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Jerry A. Littlejohn and Janice M. Littlejohn**, are indebted to the Plaintiff in the principal sum of $40,072.81, plus interest at the rate of 10 percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $8.00 which became a lien on the property as of June 25, 1993; and a claim against the subject property in the amount of $8.00 for the tax year 1993. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien against the

property which is the subject matter of this action by virtue of a tax warrant, number ITI9000257900, in the amount of $547.93, plus interest, penalties, and costs, filed on April 3, 1990; and tax warrant number ITI9101137000, in the amount of $342.54, plus interest, penalties, and costs, which was filed on November 14, 1991. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Jerry A. Littlejohn and Janice M. Littlejohn**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Jerry A. Littlejohn and Janice M. Littlejohn**, in the principal sum of $40,072.81, plus interest at the rate of 10 percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced

or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $16.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of $890.47, plus the costs of this action, for state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Jerry A. Littlejohn, Janice M. Littlejohn, and the Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Jerry A. Littlejohn and Janice M. Littlejohn**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of $890.47, plus accrued and accruing interest, for state taxes.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $16.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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State of Oklahoma ex rel
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C 593B

NBK:lg

JCD/jo/8/1/94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONTINENTAL INSURANCE COMPANY, a New Hampshire Corporation, Plaintiff, vs. CALVIN SIMMONS, d/b/a ROTH CAL ENTERPRISES and JEANNE IDLEMAN, as parent and next friend of BRETT IDLEMAN, a minor, Defendants.	)	Case No.: 93-C 956B

FILED
SEP 26 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE BY STIPULATION, BY ALL PARTIES, OF ALL PENDING CLAIMS, COUNTER-CLAIMS AND CROSS-CLAIMS

Come now all attorneys of record, representing all parties herein, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, and by stipulation, agree to the dismissal with prejudice of all pending claims, counter-claims or cross-claims, existing in the above-styled and numbered lawsuit, as all issues of law and fact have been fully compromised and settled between Continental Insurance Company and Calvin Simmons d/b/a Roth Cal Enterprises. It is specifically understood that any claims involving any of the above-named parties, currently pending in a separate legal action within the court system for the State of Oklahoma, Case No. C-92-460, is not affected by this Dismissal by Stipulation. This Dismissal is subject to the terms of a settlement agreement entered into between Continental Insurance Company and Calvin Simmons, d/b/a Roth Cal Enterprises.

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Tulsa, OK 74105

Attorney for Plaintiff
Continental Insurance Company

JOHN M. O'CONNOR
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Attorney for Defendant Calvin Simmons d/b/a Roth Cal Enterprises

TIMOTHY S. GILPIN
16 E. 16th St., Ste. 302
Tulsa, OK 74119

Attorney for Jeanne Idleman as
next friend of Brett Idleman, a minor

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARIE A. BRADLEY,

Plaintiff,

vs.

BLOUNT, INC., et al,

Defendants.

Case No. 92-C-254-B

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 30th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ANITA BRYANT SHOW, L.L.C.,

Plaintiff,

vs.

M&P PROPERTIES, INC., et al

Defendants.

Case No. 93-C-1040-B

ENTERED ON DOCKET

DATE 9-30-94

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 30th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

16

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Date 9-30-94

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED L. WATSON aka FRED WATSON; KAREN A. WATSON aka KAREN WATSON; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; FOUNDERS OF DOCTORS' HOSPITAL, INC., successor by name change to DOCTORS' MEDICAL CENTER, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

SEP 30 1994

U.S. DISTRICT COURT

CIVIL ACTION NO. 94-C 604B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30th day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, **Founders of Doctors' Hospital Inc. successor by name change to Doctors' Medical Center, Inc.**, appear by its attorney Daniel M. Webb; and the Defendants, **Fred L. Watson aka Fred Watson and Karen A. Watson aka Karen Watson**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Fred L. Watson aka Fred Watson,** will hereinafter be referred to as **("Fred L. Watson")**; and the Defendant, **Karen A. Watson aka** Karen Watson, will hereinafter be referred to as **("Karen A. Watson")**; and the Defendants, **Fred L. Watson and Karen A. Watson**, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, **Fred L. Watson and Karen A. Watson**, waived service of Summons on June 23, 1994, which was filed on June 24, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via certified mail on June 15, 1994; and that the Defendant, **Founders of Doctors' Hospital Inc. successor by name change to Doctors' Medical Center**, acknowledged receipt of Summons and Complaint via certified mail on July 1, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on July 26, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on July 8, 1994; the Defendant, **Founders of Doctors' Hospital Inc. successor by name change to Doctors' Medical Center, Inc.**, filed its answer on July 6, 1994; and that the Defendants, **Fred L. Watson and Karen A. Watson**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Twenty-One (21), Block Two (2), VONNIE JO ACRES ADDITION, in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.**

The Court further finds that on September 15, 1982, Bob G. Alberding, executed and delivered to FIRST SECURITY MORTGAGE COMPANY his mortgage note in the amount of $40,500.00, payable in monthly installments, with interest thereon at the rate of fourteen percent (14%) per annum.

The Court further finds that as security for the payment of the above-described note, Bob G. Alberding, a single person, executed and delivered to FIRST SECURITY MORTGAGE COMPANY a mortgage dated September 15, 1982, covering the above-described property. Said mortgage was recorded on September 20, 1982, in Book 4638, Page 2317, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1985, FIRST SECURITY MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to CFS MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on January 22, 1986, in Book 4920, Page 26, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 15, 1991, Commercial Federal Mortgage Corporation f/k/a CFS Mortgage Corporation assigned the above-described mortgage note and

mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on March 26, 1991, in Book 5311, Page 65, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Fred L. Watson and Karen A. Watson, currently hold record title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on July 1, 19`0, the Defendants, Fred L. Watson and Karen A. Watson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1991.

The Court further finds that the Defendants, Fred L. Watson and Karen A. Watson, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Fred L. Watson and Karen A. Watson**, are indebted to the Plaintiff in the principal sum of $73,935.59, representing an Unpaid Principal of $44,103.86, Accrued Interest of $27,895.28, and Penalties of $1,936.45, plus interest at the rate of 14 percent per annum from May 19, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,** has a lien on the subject real property by virtue of tax warrant number ITI9202281400, in the amount of $247.18 plus interest, penalties, and costs, dated November 18, 1992 and filed on November 24, 1992 in the records of Tulsa County, Oklahoma; and by tax warrant number ITI9202281500, in the amount of $1,205.14, plus interest, penalties, and costs, dated November 18, 1992, and filed on November 24, 1992 in the records of Tulsa County, Oklahoma. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Founders of Doctors' Hospital, Inc. successor by name change to Doctors' Medical Center, Inc.,** has a lien against the subject real property by virtue of a judgement in Case No. CS-90-1555, against the Defendant, Fred L. Watson, in the amount of $1,910.40, plus court costs, attorney's fees and interest, dated June 6, 1990, and recorded on June 8, 1990, in Book 5257, Page 2789 in the records of Tulsa County, Oklahoma

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Fred L. Watson and Karen A. Watson, are in** default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Fred L. Watson and Karen A. Watson**, in the principal sum of $73,935.59, plus interest at the rate of 14 percent per annum from May 19, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Founders of Doctors' Hospital, Inc. successors by name change to Doctors; Medical Center, Inc., have and recover judgment in the amount of $1,910.40, plus court costs, attorney's fees and interest, for a judgment filed on June 8, 1990, in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, have and recover judgment in rem in the amount of $1,452.32, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Fred L. Watson, Karen A. Watson, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Fred L. Watson and Karen A. Watson**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, Founders of Doctors' Hospital, Inc. successor by name change to Founders of Doctors' Medical Center, Inc., in the amount of $1,910.40, plus court costs, attorney's fees, and interest, for a judgment.

Fourth:

In payment of the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of $1,452.32, plus accrued and accruing interest, for state taxes which are currently due and owing. The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94- 604B

NBK:lg

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 30 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CEASAR SAM, JR., d/b/a ARROW WRECKING CO.,

Plaintiff,

vs.

CONTINENTAL INSURANCE COMPANY, a New York Corporation,

Defendant.

Case No. 93-C-857-BU

ENTERED ON DOCKET
DATE SEP 30 1994

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 30 day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

30

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIRGIL J. NIEMEYER,

Plaintiff,

v.

KUHLMAN ELECTRIC CORPORATION, a Delaware corporation,

Defendant.

Case No. 94-C-373-BU

ORDER DISMISSING CASE WITH PREJUDICE

The Court, having reviewed the parties Joint Stipulation of Dismissal With Prejudice, hereby enters the following order in the above-styled case.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-styled case is Dismissed With Prejudice, pursuant to the parties Joint Stipulation of Dismissal With Prejudice which has been filed as a matter of record in this case.

DATED this 29 day of September, 1994.

Michael Burrage
UNITED STATES DISTRICT JUDGE

TJB-1056

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 29 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, et al.,

Plaintiffs,

vs.

COLLECTOR OF INTERNAL REVENUE, et al., JOHN DOES 1-10,

Defendants.

Case No. 94-C-350-BU

ENTERED ON DOCKET
DATE SEP 30 1994

ORDER

This matter comes before the Court upon the Motion to Withdraw as Plaintiff filed by Plaintiff, Gladys Thelma Eidson, on September 12, 1994. Upon due consideration, the Court finds that the motion should be and is hereby GRANTED. The complaint of Plaintiff, Gladys Thelma Eidson, against Defendants is hereby DISMISSED.

ENTERED this 29th day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE SEP 30 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 29 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TERI M. BAIR,

Plaintiff,

vs.

SAMSON PRODUCTIONS SERVICES, INC.,

Defendant.

Case No. 94-C-287-K

O R D E R

The above captioned case is dismissed without prejudice for failure of Plaintiff's Counsel to appear at the Status Conference on Thursday, September 29, 1994, at 9:30 a.m.

IT IS SO ORDERED THIS 29 DAY OF SEPTEMBER, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREEDOM RANCH, INC., d/b/a FREEDOM HOUSE, an Oklahoma non-profit corporation,

Plaintiff,

vs.

THE CITY OF TULSA, OKLAHOMA, an Oklahoma municipal corporation; THE BOARD OF ADJUSTMENT OF THE CITY OF TULSA; BRENDA MILLER, Director of the Department of City Development; and SUSAN SAVAGE, Mayor of the City of Tulsa,

Defendants.

No. 93-C-96-K

ENTERED ON DOCKET
DATE SEP 30 1994

FILED
SEP 29 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court for consideration of the defendants' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendants and against the plaintiff.

ORDERED this 29 day of September, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREEDOM RANCH, INC., d/b/a FREEDOM HOUSE, an Oklahoma non-profit corporation,	)	
Plaintiff,	)	
vs.	)	No. 93-C-96-K
THE CITY OF TULSA, OKLAHOMA, an Oklahoma municipal corporation; THE BOARD OF ADJUSTMENT OF THE CITY OF TULSA; BRENDA MILLER, Director of the Department of City Development; and SUSAN SAVAGE, Mayor of the City of Tulsa,	)	
Defendants.	)	

ORDER

The Court has before it for consideration Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment. Because in connection with this motion the Court has reviewed matters outside the pleadings, as well as the briefs and record filed in the present case, the motion shall be treated as one for summary judgment.

FACTS

Plaintiff Freedom Ranch, Inc., doing business as Freedom House, operates a pre-release center facility under contract with the Oklahoma Department of Corrections to house convicts prior to expiration of their sentences. The facility, located in an area zoned Central Business District of downtown Tulsa, is currently zoned Use Unit 5, "transitional living center." However, in 1991 after inspection by a City Code Enforcement Officer, Defendant City

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of Tulsa notified plaintiff that it must apply for a special exception to operate as a Use Unit 2 "convict pre-release center." The City of Tulsa's zoning code permits the operation of a Use Unit 2 "convict pre-release center" only if a special exception is granted by the Board of Adjustment. Plaintiff applied to the Board of Adjustment for the special exception but was denied. Subsequently plaintiff appealed to the District Court of Tulsa County, which also denied plaintiff's application for special exception. Plaintiff appealed to the Court of Appeals of the State of Oklahoma, and on February 1, 1994, it affirmed the Trial Court's judgment, affirming the denial of plaintiff's request for special zoning exception by the Board of Adjustment of the City of Tulsa. See Application of Freedom Ranch, Inc., 878 P.2d 380 (Okla.Ct.App.1994). Then on July 13, 1994, the Supreme Court of the State of Oklahoma denied certiorari to review the appellate court decision, and notification of same has been filed in the present case.

In the case before this Court, Plaintiff has requested the Court to enter judgment declaring that the Tulsa Zoning Code and Defendants' enforcement of same violated its constitutional and due process rights under the United Sates Constitution, to issue a permanent injunction prohibiting defendants from interfering with its use of the subject property, and to award it costs including attorney fees.

LEGAL ANALYSIS

Summary judgment is authorized pursuant to Fed.R.Civ.P. 56(c) if the movant establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Plaintiff argues that the City of Tulsa's zoning ordinance is unconstitutional and denies it equal protection guaranteed under 42 U.S.C. §§ 1983 and 1988. Although Plaintiff has operated the present facility since 1987 as a Use Unit 5 classification, "transitional living center," and has continually received assurances from Defendant that the use of the subject property was properly classified, it argues that Defendants in denying its

application for special exception were motivated solely by unlawful, unreasonable and arbitrary bias against the ex-offender status of the residents of Freedom House. Plaintiff further argues there is no rational basis for distinguishing between its use of the subject property and similar uses within the City of Tulsa. However, the City of Tulsa contends that it does not violate the Equal Protection Clause just because the classifications contained in its ordinances are not perfect. The zoning ordinance was not written to apply only to Freedom House as a convict pre-release facility. Rather the zoning ordinance was written to have broad application to any "half-way" house or "pre-release" center which houses prisoners of all types, but distinguished, not arbitrarily or irrationally, by submission of a specific application for special exception permit. Zoning ordinances which do not involve suspect classifications or impinge on fundamental rights are examined under the rational basis test and upheld if they are rationally related to legitimate governmental purpose. Bannum, Inc. v. City of St. Charles, Mo., 2 F.3d 267 (8th Cir. 1993). Further, the City does not violate the Equal Protection Clause just because the classifications contained in its ordinances are not perfect...it is not arbitrary or irrational for the City to create this broad category. (Citation omitted.) Id., at 273.

This Court agrees with the analysis articulated by the Oklahoma Court of Appeals. Further, under principles of issue and claim preclusion, the Court finds Plaintiff's claims resolved by the decision. See Carter v. City of Emporia, Kansas, 815 F.2d 617,

619 (10th Cir.1987)(preclusion rules apply state court judgments to actions brought in federal court under §1983).

In conclusion, the Court finds that summary judgment should be granted in favor of the Defendants and against the Plaintiff on its §1983 and §1988 claims.

ORDERED this 29 day of September, 1994.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICK THRASHER,

Plaintiff,

vs.

B&B CHEMICAL, INC. a Florida Corporation,

Defendant and Third-Party Plaintiff,

vs.

FLORIDA DRUM COMPANY,

Third-Party Defendant,

and

TRAVELERS INSURANCE COMPANY, INC.,

Intervenor,

and

AMERICAN AIRLINES, INC.,

Intervenor.

No. 90-C-871-E

JUDGMENT ON JURY VERDICT

This matter came on for trial before the Court and a jury, Honorable James O. Ellison, District Judge, presiding. The plaintiff, Patrick Thrasher, was present in person, and by his attorney, Joe L. White. The defendant and third-party plaintiff, B&B Chemical, Inc. was present by its representative, and by its attorney, Randall A. Breshears. The third-party defendant Florida Drum Company was present by its representative, and by its attorney, Robert L. Huckaby. Intervenors, Travelers Insurance

Company, Inc. and American Airlines, Inc., having notice of the trial, but having announced at Pre-Trial that they would be bound with prejudice by a judgment for B & B Chemical, Inc. and against Patrick Thrasher, as to all causes of actions against all other parties, did not appear. All parties announced ready for trial. The jury was selected, impaneled, and properly sworn and instructed. The plaintiff called witnesses, presented testimony and evidence and rested. The defendant and third-party plaintiff called witnesses, presented testimony and evidence and rested. The third-party defendant called witnesses, presented testimony and evidence and rested. The defendant and third-party plaintiff demurred to plaintiff's evidence which was overruled. The third-party defendant demurred to the defendant and third-party plaintiff's evidence which was overruled. The court prepared jury instructions, and the jury was then instructed on the law. The plaintiff, defendant and third-party plaintiff, and third-party defendant gave closing arguments, after which the jury retired to deliberate and on August 24, 1994, returned the following verdict which was accepted by the court:

> We, the jury, impaneled and sworn in the above entitled cause, do, upon our oaths, find the issues in favor of the defendant, B & B Chemical Company.
>
> Sally J. Wales, Foreperson August 24, 1994

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of the defendant and third-party plaintiff, B & B Chemical, Inc., and third-party defendant, Florida Drum Company, and against the plaintiff, Patrick Thrasher, and against intervenors Travelers Insurance Company, Inc. and American Airlines, Inc. Costs to the prevailing party are to be determined and set upon proper filing of a Motion to Tax Costs.

S/ JAMES O. ELLISON
Judge of the District Court

APPROVED AS TO FORM:

Joe L. White
Attorney for Plaintiff

Randall A. Breshears
Attorney for Defendant and Third-Party Plaintiff

Robert L. Huckaby
Attorney for Third-Party Defendant

Steve Bunting
Jennifer Mustain
Attorneys for Intervenor, Travelers Insurance Company, Inc.

R. Tom Hillis
Attorney for Intervenor, American Airlines, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE SEP 29 1994

ELLEN L. MOORE,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-266-B

FILED
SEP 29 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court for consideration is Plaintiff Ellen L. Moore's appeal (Docket #1), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits. Plaintiff applied for Title II disability insurance benefits on April 19, 1991. The ALJ denied her request on January 21, 1992. On March 3, 1993, the Appeals Council denied Plaintiff's request for review. Plaintiff now seeks judicial review of the Secretary's action.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423 (d)(1)(A). An individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of

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> substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial if it is overwhelmed by other evidence--particularly

> certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person

is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920. In this case, the ALJ entered a decision at the fourth level of the inquiry, finding that Plaintiff could perform her past relevant work as a receptionist and office manager.

Plaintiff argues that she cannot perform her past work due to adverse side effects from medication, and due to pulmonary sarcoidosis, which results in extreme fatigue. She also argues that the ALJ did not give the proper weight to the opinion of Plaintiff's treating physician, who stated that Plaintiff cannot perform her past work. Dr. Mayfield treated Plaintiff from August 8, 1980, to December 14, 1990. He stated that her condition "was incapacitating for her usual job of secretarial work due to ease in fatigue and difficulty standing and moving about" (Tr. 453). However, it is unclear whether he still considered Plaintiff to be disabled as of 1988, or whether he only considered Plaintiff disabled in 1982, when she quit working.[1] The Court believes that the ALJ correctly evaluated the record as a whole, including Dr. Mayfield's findings, to determine that Plaintiff's condition responded to treatment, and that she was not precluded from performing her past relevant work.

In fact, Dr. Mayfield indicated that, by October 1984, Plaintiff's Prednisone dosage was down to a maintenance dosage of

[1]Because the ALJ applied administrative res judicata to Plaintiff's previous claims, which were denied, the relevant time period for this case begins on May 3, 1984. The relevant time ends on June 30, 1988, which was the last day Plaintiff met the insured status requirements (Tr. 120).

five milligrams every other day (Tr. 202). He noted in February and March 1985 that Plaintiff did not have any neurological problems or respiratory difficulty (Tr. 201). In November 1985, he noted that Plaintiff had not had a relapse of her sarcoidosis although she had been off her steroid medication for a few months (Tr. 200). In October 1986, he noted that both her vital capacity and diffusion had improved. Her chest x-rays also "probably" showed improvement (Tr. 198).

According to Dr. Mayfield's records, Plaintiff's pulmonary function study results were at least 80 percent normal between December 1984 and May 1988, other than the times she was diagnosed as having a virus, bronchitis or allergies (Tr. 23). Dr. Redding, the medical expert, testified that Plaintiff was not precluded from performing light work activity (Tr. 73, 76, 88).

Dr. Taylor, the consultative examiner, found in March 1984 that Plaintiff had no neurological, motor or sensory deficits, and there was no evidence of joint swelling, effusion, tenderness, warmth or erythema (Tr. 354). Dr. Taylor diagnosed Plaintiff as having arthralgia or arthritis, especially in her knees, which was fairly well controlled by medication (Tr. 355). He stated that she was in "no acute distress" (Tr. 354).

Plaintiff had complained of not being able to "think properly" or to concentrate well. Dr. Goodman, who conducted a psychiatric examination of Plaintiff in October 1991 stated that Plaintiff is "a very intelligent and capable individual who has retained enough psychological capability to probably do moderately complicated work

activities although she is not functioning on the same level that she had previously" (Tr. 482).

Plaintiff also argues that the ALJ did not adequately weigh the Vocational Expert's testimony, which concluded that Plaintiff could not perform her past work. This is a misstatement of the Vocational Expert's testimony. Plaintiff had testified that she could only work two hours per day. The Vocational Expert testified that, if Plaintiff's testimony were true, she would not be able to perform her past work (Tr. 93). However, the ALJ did not find Plaintiff's testimony wholly credible. He found her subjective complaints to be credible only "to the extent that they are consistent with the herein determined residual functional capacity" (Tr. 30). Plaintiff's residual functional capacity was found by the ALJ to allow her to perform sedentary and light level work activities (Tr. 27, 30). He found that she cannot perform work involving sustained complex job activities, frequently lifting and carrying more than 10 pounds, occasionally lifting 20 pounds and standing and walking for long periods without the ability to alternately sit and stand (Tr. 30). Her past relevant work as a receptionist and office supervisor did not require her to perform such functions.[2] Id.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support

[2]Plaintiff also argues that the ALJ mistakenly relies on the grids. However, the ALJ entered a decision at the fourth step of the evaluation sequence, finding that Plaintiff is able to perform her past relevant work. Therefore, the grids did not come into play in this case as the ALJ did not reach the fifth step.

the ALJ's findings that Plaintiff's impairment does not prevent her from performing her past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 29th DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DORIS OWINGS,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

Case No. 93-C-625-B

FILED

SEP 29 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

SEP 29 1994

DATE

ORDER

This matter comes on for consideration of Plaintiff's Complaint seeking judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying Plaintiff's application for disability insurance benefits under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq.*

Doris Owings, (Plaintiff or claimant) filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on September 10, 1990. Plaintiff's application was denied initially, and again upon reconsideration. After an administrative hearing held on May 8, 1991, the Administrative Law Judge (ALJ) issued an unfavorable decision on June 28, 1991. The Appeals Council remanded the case to the ALJ for a supplemental hearing which was held on September 16, 1992. The (new) Administrative Law Judge (ALJ) issued an unfavorable decision on December 15, 1992. The Plaintiff's request for review, filed on February 16, 1993, was denied by the Appeals Council on May 18, 1993.

The Plaintiff filed this action on July 8, 1993, pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative decision to deny benefits under §§216(i) and 223 of the Social Security Act. Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir.1978).

Plaintiff primarily complains of arthritis in her hands, unclear vision in her right eye, pain from sitting, standing or walking too long at any one time, back and knee pain, allergies, and impaired hearing in her left ear.

Plaintiff sets forth three grounds for reversing the ALJ's denial of benefits:

1) The ALJ improperly assessed the physical demands of Ms. Owings' former work.

2) Ms. Owings' limitations preclude such work under Social Security Ruling 83-12.

3) The ALJ failed to call a vocational expert to testify about the vocational impact of Ms. Owings' hearing impairment.

The Social Security Act entitles every individual who "is

under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. §423(d)(1)(A). An individual

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. *See,* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987); Talbot v. Heckler, 814 F2d 1456 (10th Cir.1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir.1983); and Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988). The five steps, as set forth in the authorities above cited, proceed as follows:

(1) Is the claimant currently working? A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) If claimant is not working, does the claimant have a severe impairment? A person who does not have an impairment or combination of impairments severe enough to limit his or her ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) If the claimant has a severe impairment, does

it meet or equal an impairment listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1. A person whose impairment meets or equals one of the impairments listed therein is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) Does the impairment prevent the claimant from doing past relevant work? A person who is able to perform work he or she has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) Does claimant's impairment prevent him or her from doing any other relevant work available in the national economy? A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, at 243; Talbot v. Heckler, at 1460; 20 C.F.R. § 416.920.

The ALJ followed the above approach set forth above and concluded:

1) That claimant has not engaged in any substantial gainful activity since the alleged onset date (January 1, 1989).

2) That the "claimant has the residual functional capacity to perform work-related activities except for work involving frequent, rapid, or extreme bending; more than very limited vision in the right eye; prolonged walking; less than clean air; prolonged sitting without the opportunity to change positions; almost any climbing; concentrated exposure to paper dust; high stress or high pressure; 10 pounds frequently; and hearing with the left ear requiring better than severe to profound full range loss and hearing with the right ear requiring better than moderate to severe high frequency loss (20 CFR 404.1545)." Tr. at 26, #5.

3) That the claimant "does not have an impairment or combination of impairments which meets or equals any of the

listed impairments in Appendix 1" to Subpart P of Regulations No.4.

4) The claimant's past relevant work as a credit clerk, as the claimant actually performed her position, did require the performance of work-related activities precluded by the above limitations (20 CFR 404.1565).

5) The claimant's past relevant work as a credit clerk, as the position is usually performed in the national economy, does not require the performance of work-related activities precluded by the above limitations (20 CFR 404.1565).

The ALJ determined claimant is not disabled within the meaning of the Social Security Act.

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, at 1521; Brown, at 362.

The Plaintiff has the burden to show that she is unable to return to the prior work she performed. Bernal, at 299. Further, the Plaintiff has the burden of proving her disability that prevents her from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577 (10th Cir.1984).

The Plaintiff's initial argument for reversal is based upon the ALJ's alleged improper assessment of the physical demands of claimant's former work. The ALJ concluded that:

"claimant has the residual functional capacity to perform work-related activities except for work involving

> frequent, rapid, or extreme bending; more than very limited vision in the right eye; prolonged walking; less than clean air; prolonged sitting without the opportunity to change positions; almost any climbing; concentrated exposure to paper dust; high stress or high pressure; 10 pounds frequently; and hearing with the left ear requiring better than severe to profound full range loss and hearing with the right ear requiring better than moderate to severe high frequency loss (20 CFR 404.1545)." Tr. at 26, #5.

The ALJ further concluded that:

> "claimant's past relevant work as a credit clerk, as the claimant actually performed her position, did require the performance of work-related activities precluded by the above limitations (20 CFR 404.1565)." Tr. at 26, #6.

Plaintiff acknowledges that "it is not enough for Ms. Owings to show she cannot return to her previous job as a credit clerk. She must also show she is unable to return to that "type" of work as generally performed in the national economy. *See* Soc.Sec.Rul. 82-61, 1982 WL 31387 at *2." Plaintiff, however, argues that the ALJ improperly assessed the physical demands of credit clerk as generally performed in the national economy, and that the claimant's admitted limitations preclude her performance of that work per Social Security Ruling 83-12.

In effect Plaintiff argues the ALJ did not go far enough, i.e. did not comply with the Secretary's fiat that all ALJ rulings denying benefits on Step 4 be clear and contain specific findings as to the physical demands of a past job, citing Soc.Sec.Rul. 82-62, 1982 WL 31386 at *4., and Curtis v. Sullivan, 808 F.Supp. 917, 922-23 (D.N.H. 1992). Specifically, Plaintiff complains that the vocational expert's testimony is conflicting in that she appears to indicate that claimant's past job as she performed it required too

much walking to fit the restrictive limitations specified by the ALJ contrasted with her testimony as to claimant's past job as performed in the national economy "probably would be more sitting that walking in that job".

The Court does not share Plaintiff's view of essential conflict in the testimony of the vocational expert, Cheryl Mallon, who also testified that claimant may be precluded from her past work as she performed it because "[S]he (claimant) reported -- she probably had to walk more than most people in that type of a job would have to walk. I think she said she sat maybe two hours and walked --(presumably the remaining six hours)". Ms. Mallon testified very clearly that claimant should be able to do her past job, as it is usually done in the national economy, with her specified limitations and that such jobs existed (91,000 nationally and 10,000 regionally). Tr. at 83. The Court concludes the ALJ's findings on this issue are supported by substantial evidence.

Plaintiff's additional argument, essentially subsumed in the prior argument, is that the vocational expert testimony is flawed in that the expert's description of claimant's past job requirements was equivocal. Plaintiff argues that the vocational expert's "testimony is not substantial enough to overcome the presumption that the Secretary's DOT generalization applied."[1]

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[1] 20 CFR § 404.1567 states that the physical exertion classifications in the Secretary's regulations have the same meaning as that in the Department of Labor (DOT). DOT rates credit work as "sedentary" work. 2 U.S.Dept. of Labor, *Dictionary of Occupational Titles* 175 (4th ed.1991).

Plaintiff candidly admits that, "[W]hile the ALJ may rely on DOT descriptions to provide substantial evidence of how a job as (sic) is usually performed in the national economy, such reliance is not required. 20 CFR § 404.1566(d)(1), Soc.Sec.Rul. 82-61, 1982 WL 31387 at *2.; *see, e.g., Brooks v. Sullivan*, 766 F.Supp. 584 (N.D. Ill.1991)." The Court concludes the evidence the ALJ relied upon on this issue was substantial.

Plaintiff's second argument, that the ALJ's findings are contrary to Social Security Ruling 83-12 and other evidence, relates to the division between standing and sitting in sedentary work essentially as discussed in the walking/sitting issue above. Plaintiff cites Wages v. Secretary of HHS, 755 F.2d 495, at 498 (6th Cir.1985) which case quotes Social Security Ruling 83-12, 1983 WL 31253 at *3, in part, as follows:

> "[Where a] person must alternate periods of sitting and standing . . .[s]uch a person is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work."

Again, the Court sees no inconsistency in the sitting/standing issue with the above ruling. It is the Court's view that the ALJ's determination that claimant, in her credit clerk past job as performed in the national economy, could, based upon claimant's own testimony and that of the vocational expert, perform such job, is based upon substantial evidence.

Lastly the Plaintiff cites as error the ALJ's failure to call a vocational expert concerning what impact claimant's hearing

impairment might have on her ability to do her former work as generally performed in the national economy. The Secretary responds that it is well-settled law that the ALJ has no duty to support a decision with vocational expert testimony when a claim is denied at any of the first four steps of the sequential evaluation process, such as done in the case *sub judice*, because the burden of proof is on the claimant. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir.1992). Further, the Secretary argues, and the record supports, that claimant has successfully performed her credit clerk job in the past despite this longstanding hearing impairment which the Plaintiff has had since the age of five.[2]

SUMMARY

The ALJ considered all the evidence and concluded that Plaintiff could perform her past relevant work as it is performed in the national economy. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence.

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[2] Plaintiff suffered a hearing loss to her left ear due to an injury suffered at the age of five.

The Court concludes there is substantial evidence to support the ALJ's finding that Plaintiff is able to perform her past relevant work as it is usually performed in the national economy. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 29th DAY OF September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. COTNER, et al.,

Plaintiff,

vs.

SHERIFF DOUG NICHOLS, et al.,

Defendants.

No. 92-C-930-C
(Base File)

92-C-914-C

ORDER

Before the Court is Plaintiff Clyde Knox's "motion to dismiss without perjury." After carefully reviewing the motion, the Court construes it as a motion to dismiss this action without prejudice as to Plaintiff Knox. The Defendants do not object.

ACCORDINGLY, IT IS HEREBY ORDERED, that Plaintiff's motion to dismiss without prejudice (doc. #47) be **granted**, and that Plaintiff Clyde Knox be **dismissed** as a party in the above consolidated action. The Clerk shall **terminate** Case No. 92-C-914-C.

SO ORDERED THIS 28th day of Sept., 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

Richard M. [illegible] Clerk
U. S. D[illegible]
NORTHERN DI[illegible]

ROBERT E. COTNER, et al.,

Plaintiff,

vs.

SHERIFF DOUG NICHOLS, et al.,

Defendants.

No. 92-C-930-C
(Base File)

92-C-914-C

ENTERED ON DOCKET
DATE SEP 28 1994

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H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. COTNER,

Plaintiff,

vs.

DOUG NICHOLS,

Defendant.

No. 92-C-930-C
(Base File)

ORDER

In this class action pursuant to 42 U.S.C. § 1983, Robert E. Cotner challenges the conditions of confinement at the Creek County Jail on his behalf and on behalf of eighteen other inmates. This Court granted Plaintiff Cotner leave to proceed in forma pauperis as he was the only one who submitted a motion to proceed in forma pauperis and ordered a review of the complaint and a written report under Martinez v. Aaron, 570 F.2d 317, 318-19 (10th Cir. 1978). Sheriff Doug Nichols has moved to dismiss this action as frivolous and for reasonable restrictions upon future lawsuits filed by Plaintiff Cotner. For the reasons stated below, the Court concludes that Cotner's unsupported request to file this suit as a class action should be denied and that Defendant's motion should be granted.

I. BACKGROUND

Although Cotner's claims in the instant complaint stem from his incarceration at the Creek County Jail from March 4, until June 30, 1992, and his subsequent conviction in Creek County District Court on April 27, 1992, in case no. CRF-91-194, it is important to

summarize the events preceding and following the filing of this action as they relate to the disposition of this case.

Prior to his incarceration in March 1992, Cotner sued several Creek County officials, including Deputy Sheriff Larry Fugate, for violations of his Fourth Amendment right in connection with a search and seizure of his property on July 20, 1991. See Cotner v. Fugate, 92-C-0064-E. In May 1992, Judge James O. Ellison dismissed that case as to Fugate on the ground that service of process was insufficient and as to the other defendants on the ground that Plaintiff's allegations lacked the necessary specificity to withstand a motion to dismiss for failure to state a claim.

While that case was pending before the Tenth Circuit Court of Appeals, Cotner filed the instant action on October 1, 1992, as a class action on his behalf and on behalf of eighteen other inmates. Cotner alleged denial of medical care, recreation, and exercise; denial of access to the court, the law library, and legal assistance; and inadequate visitation. In support of his individual claims, Cotner alleged as follows:

> From March 4, 1992, until June 30, 1992, Plaintiff Cotner was held in solitary confinement punishment cell in the Creek County jail and refused access to:
>
> a law library; medical medication; medical personnel; medical treatment; legal assistance; access to phones; access to other prisoners; access to any rec[r]eation; access to outside sun light or rec[r]eation; due process in appealing his placement in that cell; reading material; legal mail; access to the courts; 'comosary' [sic] to buy his needs; and did have his civil and other rights violated, and was subject to cruel and unusual punishment.

Cotner also alleged "all other civil and constitutional rights set out in Clayton v. Faulkner," the Tulsa federal case challenging the

conditions of confinement at the Tulsa County jail. Cotner sought damages and equitable relief. (Doc. #1.)

Attached to his complaint are two affidavits from Cotner, a "petition" signed by ten inmates desiring to be part of this class action, and letters from three other inmates also desiring to be a part of this action. In his first affidavit, Cotner attested to the following:

> I, Robert E. Cotner, under oath hereby swear the following is true:
>
> That on March 4, 1992, I was placed in a solitary confinement punishment cell in the Creek County Jail, and Kept there until June 30, 1992.
>
> While I was there I was denied access to a law library, my own Doctor's medication, legal assistance, phones, medical personnel or treatment as needed, access to outside recreation, t.v. or other recreation allowed other prisoners, legal mail (at least once I sent a pro se motion for a new trial to the clerk for filing and jail personal [sic] 'lost' it so that I was denied that right in a criminal case), and I was denied due process of finding out why I was put in the cell, or appealing it, and I was denied my constitutional and civil rights while there.
>
> In addition, I was subjected to threats by Creek county officer Larry Fugate, some of which were carried out by him, and I was refused to be allowed a copy of the Mar. 92 search warrant used, property taken from my home, or events that forced my wife to flea for frea [sic] of Fugate (I have never hurd [sic] from her sence [sic]) nore [sic] was I allowed to know of the legal motions or proceeding in federal court concerning the federal civil suit I had filed against Fugate before I was placed in the Creek County jail.
>
> I know James Clayton and Fugate took my copy of his suit against the Tulsa county jail, and I state here all the aligations [sic] in it plus more are appliable [sic] to this case, and the other plaintiffs listed ask me to prepair [sic] and help them with this.

(Doc. #1.)

In his second affidavit, Cotner complained about the seizing of property which he had paid with credit cards and alleged that Fugate should be prosecuted for any use of Cotner's credit cards or

checks. (Id.)

After filing the instant action, Plaintiff began harassing the Creek County District Attorney office into settling this class action, the action against Fugate, and a forfeiture action pending in state court in connection with property seized during the July 1991 search. On October 16, 1992, Max Cook, Assistant District Attorney, received a copy of the complaint in this class action with the following statement handwritten on the first page:

> Max Want to stop this one before it gets going? Want to settle the case I already have against Fugate in the 10th Cir.-?- How about I transfer the forfeiture C-91-350 case to Federal Court? (or do you want to settle it now?)--(call me in prison if you want to talk about it this week!! (It's now or never!)

On November 30, 1992, Don Nelson, Assistant District Attorney for Creek County, received the following note from Cotner:

> Don Nelson, (illegible)
> Why did the sheriff refuse to return 71 of the items we agreed would be returned? Why was the judge's Oct. 23rd order not correct or showed what we agreed on?
> Come see me before Christmas if anyone wants to settle the federal lawsuit against the jail, and/or the one against Fugate, -- or it will be too late to settle out of court.
> Robert E. Cotner
> When will I get a copy of the Nov. 92 search warrant Fugate used, and a list of what he took?

On December 2, 1992, Defendant's attorney Max Cook received yet another note from Cotner:

> Max, You have until Dec. 15th to talk to me about settling [sic] this and/or the federal case I have against Fugate, OUT-OF-COURT. After that date I expect to have an out of state attorney that should take them if they have not been settled.
>
> Max, consider anything I file or send you, or else . . . (illegible) from the other 5 prisoners who are about ready to file their federal suits against Creek Co,

etc (like mine) because theirs will be almost duplicate of mine.[1]

On December 17, 1992, the Tenth Circuit Court of Appeals affirmed the dismissal of Cotner v. Fugate, 92-C-0064-E, for improper service of process as to Defendant Fugate and denied Cotner's request to proceed in forma pauperis on appeal because he made no rational argument on the law or fact. In spite of the dismissal, on December 24, 1992, Cotner filed yet another action against Larry Fugate and Doug Nichols for violations of his Fourth Amendment right in connection with the July 20, 1991 search and seizure. See Cotner v. Fugate, 92-C-1182-BU.

II. PROCEDURAL HISTORY

As noted above, Defendant Nichols has moved to dismiss the case presently pending before the Court as frivolous and has requested reasonable restrictions on any future filings by Cotner. Defendant Nichols contends that Cotner's complaint makes broad and conclusory allegations not supported by any facts; that Cotner has been granted leave to proceed in forma pauperis in approximately forty-three lawsuits in this Court; and that the number of

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[1]The Court notes that on December 7, 1992, inmate Glen Lee filed an action against Sheriff Nichols identical to the one filed by Cotner in the case at hand. See Lee v. Nichols, 92-C-1114. This Court consolidated Lee's action with Cotner's case on September 27, 1993, but ultimately dismissed it without prejudice on Lee's motion to dismiss on January 18, 1994.

On October 12, 1993, Clyde Knox also filed an action identical to the one filed by Cotner in this case. See Knox v. Nichols, 93-C-914-B. Knox's action was consolidated with Cotner's case and is being dismissed on Knox's motion to dismiss without prejudice on the same day as the date of filing of this order.

frivolous lawsuits by Cotner continues to be out of control. Defendant also argues that the notes which Cotner sent to the Creek County District Attorney's Office indicate that Cotner filed this action only as an attempt to harass the State of Oklahoma into settling and letting him out of prison. (Doc. #35.)

In his objections to Defendant's motion to dismiss, Cotner argues that the notes relied upon by the Defendant were nothing but "good faith attempt[s] to settle like any good attorney would attempt" to do. He argues that Defendant's motion is based on the preconceived notion that Cotner is a jailhouse lawyer who has had to file a lot of cases in the past. (Doc. #37 at 3.)

III. ANALYSIS

At the outset the Court denies Cotner's unsupported request for a class action. Cotner has not established that the class is so numerous that joinder of all members is impracticable, that there are questions of law or fact common to the class, that the claims or defenses of the representative parties are typical of the claims or defenses of the class, and that the representative parties will fairly and adequately protect the interests of the class. See Rule 23(a) and (b) of the Federal Rules of Civil Procedures.

Having concluded that this case should not proceed as a class action, the Court notes that Cotner does not have standing to litigate claims on behalf of the eighteen other prisoners named in his complaint. Nor can Plaintiff Cotner act as an attorney for the

these other plaintiffs. Federal Rule of Civil Procedure 11 states that all papers must be signed by the party's attorney, if the party is represented by counsel, or by the party, if he or she is not represented by an attorney. As none of the eighteen class members signed the complaint or any other pleading in this case, the Court concludes that they should be dismissed as Plaintiffs in this action for lack of prosecution.

The Court will address next Defendant's request to dismiss this case as frivolous under 28 U.S.C. § 1915(d) and for reasonable restrictions on future filing by Plaintiff Cotner.

A. Request for Dismissal Under 28 U.S.C. § 1915

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Hall v. Belmon, 935 F.2d 1106, 1108 (10th Cir. 1991). Fanciful factual allegations instead refer to those assertions which are clearly baseless, fantastic, or delusional.

Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Hall, 935 F.2d at 1109.

Even construing Plaintiff's allegations liberally, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and accepting them as true, see Reed v. Dunham, 893 F.2d 285, 286 (10th Cir. 1990) (per curiam), the Court concludes that Plaintiff's allegations are too vague and conclusory to be sufficient to state a claim arguably based in law or fact. The Tenth Circuit Court of Appeals has recognized that "[c]onstitutional rights allegedly invaded, warranting an award of damages, must be specifically identified," and that "[c]onclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981); see also Reed, 893 F.2d at 286 (affirming a section 1915(d) dismissal given the "complete absence of factual allegations supporting plaintiff's conclusory reference to the denial of their rights . . . under the fourteenth amendment"). Plaintiff Cotner has not alleged any underlying facts to support any of his allegations. He merely sets out a laundry list of general deprivations while at the Creek County jail and incorporates "all other civil and constitutional rights set out in the Clayton v. Faulkner Tulsa federal 1979 case."

The Martinez report further indicates that Plaintiff's claims lack any factual or legal bases. The Martinez report shows that Cotner was not placed in solitary confinement, but was assigned to a single man cell because he was an escape risk. The Martinez

report also shows that Plaintiff received medical treatment and medication, was permitted visitation on Sunday for ten minutes per visitor, and was taken to the exercise yard for one hour on at least two occasions. Although it is undisputed that Creek County prisoners, including Cotner, had no access to a law library, the Martinez report confirms that paupers affidavits, telephones, and access to the mail were readily available, and that prisoners were given free stamps and envelopes if they requested them and were unable to afford them. The Court also notes that Cotner has not alleged that Defendant Nichols in any significant way restricted access to his counsel to prepare a defense in his criminal case in Creek County, or restricted access to the telephone and free postage for communications with the courts and other attorneys. See Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991) (a prisoner's constitutional right of access to the courts is not conditioned on the showing of need, but on the absence of alternative legal resources); Love v. Summit County, 776 F.2d 908, 914-15 (10th Cir. 1985) (prisoner was not denied access to the law library because he had access to counsel to pursue his civil rights claims at all times during his incarceration, and had access to telephone and free postage), cert. denied, 479 U.S. 814 (1986). Nor do any of the alleged threats on the part of Larry Fugate amount to a constitutional violation actionable under 42 U.S.C. § 1983. Compare Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979) (allegation that sheriff laughed at prisoner and threatened to hang him was not sufficient to state a constitutional deprivation under

section 1983), with Northington v. Jackson, 973 F.2d 1518, 1522-24 (10th Cir. 1992) (allegation that police captain put revolver to inmate's head and threatened to kill him stated an excessive force claim under the Eighth Amendment).

The Court also notes that Plaintiff's vexatious attempts to use this action to harass the Creek County District Attorney's Office for prosecuting him in case no. CRF-91-194 provide further support for this Court's conclusion that Plaintiff's complaint is not arguably based in law or fact. As pointed out in the background section of this order, Plaintiff has used this class action to harass Creek County District Attorney on at least three occasions. The Court also notes that Plaintiff is not a novel litigant in this Court. In the last twenty years he has filed forty-four actions in this court alone always abusing the leniency due pro se litigants.[2] He constantly floods the Court with

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[2]As of the date of this order, Cotner has filed the following actions in this court:
Cotner v. U.S.A., 75-C-171; Cotner v. U.S.A., 75-C-248; Cotner v. Elmore A. Page, et al., 76-C-9; Cotner v. Buddy R. Warren, 76-C-188-B; Cotner v. State of Oklahoma, Tulsa County Sheriff's Department, et al., 77-C-7-B; Cotner v. Nancy Ellen Fortner, 77-C-66-C; Cotner v. State of Oklahoma, et al, 77-C-83-B; Cotner v. U.S.A., 80-C-384-C; Cotner v. Judge Lamb, et al, 80-C-385-C Cotner v. Dave Faulkner, 80-C-401-E; Cotner v. State of Oklahoma, Faulkner, Fallis, et al, 80-C-433-E; Cotner v. Mayor Inhoff, Jack Purdie, and City Counsel of Tulsa, 80-C-438-B; Cotner v. Doug Hayes, 80-C-446-B; Cotner v. Bill Mussman, 80-C-467-E; Cotner v. Officer Leekey, et al., 80-C-500-E; Cotner v. John Umholtz, and Jerry McMillin, 80-C-501-B; Cotner v. 14th District Court and State of Oklahoma, 80-C-684-C; Cotner v. 14th District Court and State of Oklahoma, 80-C-685-E; Cotner v. City of Bixby, et al., 80-C-707-E; Cotner v. The Tulsa Tribune, Steve Ward, et al., 81-C-211-E; Cotner v. B.D. Gardner, et al., 81-C-408-E; Cotner v. State of Oklahoma, Court of Criminal Appeals, et al., 81-C-433-B; Cotner v. State of Oklahoma, and Mack Alford, 82-C-723-E; Cotner v. Bill Musseman and S.M. Fallis, Jr., 82-C-966-E; Cotner v. Mack Alford, 82-C-1011-B;

frivolous motions in all his cases; he refuses to include a certificate of service in any of his pleadings and motions as required by the Federal Rules of Civil Procedure; and he often attempts to bypass the filing of his pleadings with the Clerk's Office by mailing them directly to the judge assigned to his case.

Accordingly, the conclusory nature of Cotner's allegations and lack of factual support, as well as Cotner's vexatious attempts to harass the Creek County District Attorney's Officer, lead this Court to conclude that this action is frivolous and malicious and should be dismissed under section 1915(d). See Cotner v. Hopkins, 795 F.2d 900, 902 (10th Cir.1986) (affirming the dismissal of conclusory and vague allegations under section 1915(d) of Plaintiff Cotner in the Eastern District of Oklahoma); Phillips v. Carey, 638 F.2d 207, 208 (10th Cir.) ("If the pleadings seek to press a claim for vexatious or malicious purposes, or are obviously repetitive, they may also be stricken under statutory authority and res judicata. No Responsive pleading need be required"), cert. denied, 450 U.S. 985 (1981).

Cotner v. Mack Alford, et al., 82-C-1132-E; Cotner v. Warden Alford, et al., 82-C-1174-E; Cotner v. State of Oklahoma and Warden Alford, 83-C-247-E; Cotner v. State of Oklahoma, et al., 83-C-775-E; Cotner v. Tim West, et al., 84-C-316-E; Cotner v. Tim West, et al., 84-C-406-E; Cotner v. Tulsa County Sheriff, Thurman, et al., 85-C-342-E; Cotner v. Don E. Austin, 85-C-352-C; Cotner v. David Pauling, et al., 86-C-1056-E; Cotner v. Judge Klein, 88-C-251-B; Cotner v. Tulsa County Judges, et al., 88-C-1590-B; Cotner v. Judge Clifford Hopper, et al., 89-C-186-B; Cotner Enterprises, Inc., et al., v. Larry Fugate, et al., 92-C-64-E; Cotner v. Creek County Sheriff, Doug Nichols, et al., 92-C-930-C; Cotner v. Larry Fugate, et al., and Sheriff Doug Nichols, et al., 92-C-1182-B; Cotner v. Cody, et al., 93-C-57-B; Cotner v. Cody, et al., 93-C-229-B; Cotner v. State of Oklahoma, et al., M-1506-E; Cotner v. Cody, 94-C-323-B.

B. Request for Reasonable Restrictions

Lastly the Court addresses Defendant's request for reasonable restrictions on future filings by Cotner. A litigant has no absolute, unconditional right of access to the court to prosecute frivolous or malicious actions even if he is proceeding in forma pauperis, and continuous abuses of this privilege may support the imposition of filing restrictions. Winslow v. Hunter (In re Winslow), 17 F.3d 314, 315 (10th Cir. 1994). "'The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous [claims].'" Id. (quoting In re Sindram, 498 U.S. 177, 180 (1991)).

The Tenth Circuit has recently restated that a federal court retains authority, "commensurate with its inherent power to enter orders 'necessary or appropriate' in aid of jurisdiction" under 28 U.S.C. § 1651 to place filing restrictions on future filings by litigants "with a documented lengthy history of vexatious, abusive actions, so long as the court publishes guidelines about what the plaintiff must do to obtain court permission to file an action, and the plaintiff is given notice and an opportunity to respond to the restrictive order." Werner v. The State of Utah, ___ F.3d ___, No. 94-535, slip op. at 3-4 (10th Cir. August 9, 1994) (not yet released for publication) (citing Ketchum v. Cruz, 961 F.2d 916, 921 (10th Cir. 1992) and Tripati v. Beaman, 878 F.2d 351, 354 (10th Cir. 1989)). See also Phillips v. Carey, 638 F.2d 207 (10th Cir.

1981) (recognizing that reasonable restrictions may be placed on an in-forma-pauperis litigant when he seeks to advance repetitive causes or when he files actions for obviously malicious purposes), cert. denied, 450 U.S. 985 (1981).

It is clear from the record in this case that Cotner is a vexatious litigant who has abused the jurisdiction of this Court over the years. He has consistently been allowed to proceed in forma pauperis based on his lack of financial resources. Further, he has been afforded the leniency due litigants proceeding pro se. See Haines v. Kerner, 404 U.S. 519, 520 (1972). Cotner, however, has abused these privileges. While it may be that hiding in one of these matters was, or is, a viable argument, the majority of Plaintiff's actions, as evidenced by the conclusory and malicious allegations in this case, have been frivolous.

Although the Court recognizes that filing restrictions are a harsh sanction, "where, as here, a party has 'engaged in a pattern of litigation activity which is manifestly abusive,' restrictions are appropriate." In re Winslow, 17 F.3d at 315. Accordingly, the Court imposes the following reasonable filing restrictions upon Cotner. See Werner, slip op. at 6 and In re Winslow, 17 F.3d at 315-16. Plaintiff is enjoined from proceeding as a plaintiff in any new action before this Court unless he is represented by a licensed attorney admitted to practice in this court or unless he first obtains permission to proceed pro se. To obtain permission to proceed pro se, Plaintiff must take the following steps:

1. File a motion with the clerk of this court requesting leave to file a pro se action; and

2. Include in the motion the following information:

A. A list of all lawsuits currently pending or filed previously with this court, including the name, number, and citation, if applicable, of each case, and the current status or disposition of the appeal or original proceeding; and

B. A list apprising this court of all outstanding injunctions or orders limiting petitioner's access to federal court, including orders and injunctions requiring petitioner to seek leave to file matters pro se or requiring him to be represented by an attorney, including the name, number, and citations, if applicable, of all such orders or injunctions; and

3. File with the clerk a notarized affidavit, in proper legal form, which recites the issues he seeks to present. The affidavit also must certify, to the best of petitioner's knowledge, that the legal arguments being raised are not frivolous or made in bad faith, that they are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, that the action is not interposed for any improper purpose such as delay or to needlessly increase the cost of litigation, and that he will comply with all the Federal Rules of Civil Procedure and the Local Rules of this Court.

These documents shall be submitted to the Clerk of this Court, who shall forward them to the Chief Judge for review to determine whether to permit Plaintiff to proceed pro se. If the Chief Judge declines to permit Plaintiff to proceed pro se, the matter will be dismissed. On the other hand, if the Chief Judge approves the filing, an order shall be entered indicating that the case shall proceed in accordance with the Federal Rules of Civil Procedure and the Local Rules for the Northern District of Oklahoma.

Plaintiff shall have ten days from the date of entry of this order to file written objections, limited to fifteen pages, to these proposed sanctions. See Werner, slip op. at 8. If Plaintiff does not file objections, the sanctions shall take effect twenty days from the date of entry of this order. Id. The filing restrictions shall apply to any matter filed after that time. If Plaintiff does file timely objections, these sanctions shall not take effect until after this court has ruled on those objections.

IV. CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Plaintiff's complaint should be dismissed as frivolous under 28 U.S.C. § 1915(d) and that reasonable filing restrictions should be imposed on Plaintiff Cotner.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss and for reasonable restrictions on future filings by Plaintiff Cotner (docs. #35-1 and #35-2) is granted.

(2) This action is **dismissed** as frivolous under 28 U.S.C. § 1915(d).

(3) Plaintiff is **enjoined** from proceeding as a plaintiff in any new action before this Court unless he is represented by a licensed attorney admitted to the practice in this Court or unless he **first** obtains permission to proceed pro se as outlined in this order.

(4) Plaintiff shall have ten (10) days from the date of entry of this order to **file written objections**, limited to fifteen pages, to these proposed sanctions. If Plaintiff **does not file objections**, the sanctions shall take effect twenty days from the date of entry of this order and the filing restrictions shall apply to any matter filed after that time. On the other hand, if Plaintiff **does file timely objections**, these sanctions shall not take effect until after this court has ruled on those objections.

(5) Plaintiff Cotner's motion for reasonable restriction and to separate cases (docs. #36 and #50) are **denied;**

(6) Plaintiff Cotner's motion for ruling (doc. #55) is **granted.**

SO ORDERED THIS 28th day of September, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 28 1994

Richard M. [illegible], Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE PARCEL OF REAL PROPERTY, WITH BUILDINGS, APPURTENANCES, IMPROVEMENTS, AND CONTENTS, KNOWN AS: 2121 EAST 30TH STREET, TULSA, OKLAHOMA, and ONE 1989 CADILLAC 4-DR. FLEETWOOD,

Defendants.

Case No. 90-C-728-C

ENTERED ON DOCKET

DATE SEP 28 1994

ORDER

There are several motions pending in this action filed pro se by Gary Hobbs, Mary Kay Hobbs, J. Bryant Hobbs, and E. Mae Hobbs (collectively "Hobbs) challenging the in rem judgment forfeiting the subject property to the government. These motions were referred to a magistrate judge who conducted a hearing and then entered an order concluding that there was no showing of a denial of due process in the forfeiture proceeding.

The magistrate judge originally entered an order on October 25, 1993 which appeared to be a final order disposing of all motions filed herein. The Hobbs filed a direct appeal to the Tenth Circuit Court of Appeals following entry of the order. Pursuant to the directives of the Tenth Circuit, on June 24, 1994 the magistrate judge vacated his order of October 25, 1993, entered a Report and Recommendation, and advised the parties to

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file any objections with this Court within eleven days. By the magistrate judge vacating its order of October 25, 1993, the following motions pending herein have been rendered moot.

1. Motion for Reconsideration of Order of Magistrate Judge to be Made by District Court, filed by Hobbs on December 16, 1993.

2. Motion to Strike and Objection to Motion for Reconsideration of Order of Magistrate Judge to be Made by District Court Judge, filed by Government on January 7, 1994.

3. Owner's Motion to Deny Government's Motion to Strike and Objection to Motion for Reconsideration of Order of Magistrate Judge to be Made by District Court Judge and Owner's Brief in Support, filed by Hobbs on January 18, 1994.

4. Defendants Owners Motion for Reconsideration and Motion to Set Hearing, filed by Hobbs on June 17, 1994.

On June 24, 1994 the magistrate judge converted his prior order to a Report and Recommendation, wherein he opined that claims asserted by the Hobbs should be dismissed. The magistrate judge found that the Hobbs received proper and timely notice of the in rem forfeiture proceeding and that any collateral claim of bad faith was beyond the jurisdiction of the Court. Following entry of the magistrate judge's Report and Recommendation, the Hobbs separately filed before this Court motions to reconsider.

Under proper procedure, a motion to reconsider is not entertained by the district court. District court's review of a magistrate judge's recommendation is limited to consideration of specific objections by the party or parties opposing a magistrate's recommendation. However, since extensive pleadings have been filed in this case, the Court has sua sponte conducted a de novo review of the pleadings filed herein.

Based upon the record in this action, the Court has concluded that the

recommendation entered by the magistrate judge is correct, consistent with applicable law and should accordingly be affirmed.

The record contains the filed stamped original Process Receipt and Return forms of the United States Marshals Service which clearly indicate that Mary Kay Hobbs, J. Bryant Hobbs and E. Mae Hobbs were personally served with a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem and Summons as to the defendant 1979 Cadillac 4-Dr. Fleetwood in August 1990. The Process Receipt and Return forms further reflect that Mary Kay Hobbs and Gary Hobbs were personally served with a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and Summons as to defendant real property located at 2121 East 30th Street. Additionally the record indicates that notice was provided by publication.

The Warrants of Arrest and Notice In Rem served on each of the Hobbs states that, as potential claimants they had ten (10) days from service to file a claim in the action or a Petition for Remission or Mitigation, and had twenty days after filing their claim to file an answer in the action. The record clearly indicates that the Hobbs did not file a claim or answer or submit a petition.

Judgment was entered forfeiting the properties on December 11, 1990. No appeal or other post-judgment relief motion was filed. The subject properties were subsequently sold by the government following proper procedures. The government no longer retains these properties.

The purpose of the time restriction in Rule C(6) of the Supplemental Rules for Certain Admiralty Claims "is to force claimants to come forward as soon as possible after

forfeiture proceedings have been initiated so that all interested parties can be heard and the dispute resolved without delay" and further "to prevent false claims." United States v. 51 Pieces of Real Property, 17 F.3rd 1306 (10th Cir.1994). The government commenced this civil forfeiture proceeding on August 24, 1990. Judgment of forfeiture was entered on December 11, 1990. On March 15, 1993 Gary Hobbs filed his initial objection to the forfeiture proceeding asserting generally that the Hobbs were without proper notice of government's intent to seize the subject property and that Gary Hobbs' was relying on his retained counsel in the companion criminal proceeding to handle all government's claims against him. For the Court to permit such a late filing of a notice of a claim under these circumstances would not further the goal of Supplemental Rule C(6)'s time requirements. This is especially true, when the record clearly reflects that the Hobbs each received personal service of process and notice of the time restrictions for filing claims. Further it is clear that the Hobbs were well aware that their interest in the property was forfeited to the government since the property was seized from their possession and openly sold. Nonetheless, the Hobbs did not attempt to challenge the forfeiture notice provision until some three years after entry of the in rem judgment.

The Court has independently reviewed the sealed affidavit supporting government's Complaint for Forfeiture In Rem, and finds that the affidavit is sufficient to support a finding of probable cause to forfeit the subject properties.

It is therefore the Order of the Court, that the Report and Recommendation of the magistrate judge entered herein on June 24, 1994 is affirmed and adopted as the findings and conclusions of this Court. The various pending motions are rendered moot by the

entry of this order. The Hobbs motion to reconsider the Report of the magistrate judge is denied.

IT IS SO ORDERED this 28th day of September, 1994.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 28 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KELLY NIX,

Plaintiff,

vs.

BENJAMIN DEMPS, JR., et al.

Defendants.

Civil Action No. 93-C-561 B

ENTERED ON DOCKET

DATE SEP 29 1994

STIPULATION OF DISMISSAL OF DEFENDANTS WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, the undersigned attorneys hereby stipulate to the dismissal of this action against Defendants with prejudice to refiling. All parties shall bear their own attorney's fees and costs incurred in the prosecution or defense of this action.

PLAINTIFF:

Charles Davis (OBA #2190)
Attorney at Law
2016 West Cameron
Tulsa, OK 74127-6518
(918) 587-0574

Attorney for Plaintiff.

DEFENDANTS:

John Fears, (OBA #2849)
Assistant General Counsel
Department of Human Services
P.O. Box 53025
Oklahoma City, OK 73152-3025
(405) 521-3638

Attorney for Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIRGIL J. NIEMEYER,

Plaintiff,

v.

KUHLMAN ELECTRIC CORPORATION, a Delaware corporation,

Defendant.

Case No. 94-C-373-BU

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Virgil J. Niemeyer (hereafter, "Plaintiff"), by and through his undersigned attorney of record, and the Defendant, Kuhlman Electric Corporation, a Delaware corporation, successor in interest to Kuhlman Corporation, a Michigan corporation, identified by Plaintiff as Defendant in his original state court pleading (hereafter, "Defendant"), by and through its undersigned attorney of record and hereby enter into the following Joint Stipulation of Dismissal With Prejudice, pursuant to Rule 41(a)(1) of the Fed. R. Civ. P.

1. Plaintiff and Defendant hereby stipulate that Plaintiff hereby dismisses the above-styled case with prejudice.

2. Plaintiff and Defendant enter into this Joint Stipulation of Dismissal With Prejudice voluntarily and without reservation.

3. Plaintiff and Defendant shall each bear their own costs and attorney's fees incurred in this action.

4. A proposed order dismissing the above-styled action with prejudice is submitted for the Court's signature contemporaneously with the Joint Stipulation of Dismissal With Prejudice.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

J. Patrick Cremin, OBA #2013
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2677

ATTORNEYS FOR DEFENDANT KUHLMAN CORPORATION

STIPE LAW FIRM

By: _____

Cheryl Bisbee, OBA #15726
P. O. Box 701110
Tulsa, Oklahoma 74170-1110
(918) 749-0749

ATTORNEYS FOR PLAINTIFF VIRGIL J. NIEMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

COY ARTHUR HILL,

Petitioner,

vs.

DAN REYNOLDS,

Respondent.

No. 90-C-769-E

ORDER

On June 16, 1994, the Three Judge Panel ordered counsel for the individual petitioners to supplement each petition for a writ of habeas corpus to address whether and to what extent the Tenth Circuit opinion in Harris v. Champion, 15 F.3d 1538, 1564-66 (10th Cir. 1994) (Harris II) mooted his habeas corpus claims. The Panel also requested counsel to submit a copy of the decision by the Oklahoma Court of Criminal Appeals.

On August 5, 1994, counsel filed a supplement to the petition in this case and stated that Harris II did moot Petitioner Coy Arthur Hill's habeas corpus claims because he has been discharged from custody. The opinion from the Court of Criminal Appeals, attached to Petitioner's supplement, reveals that Petitioner's conviction was reversed and the case was remanded for a new trial on December 14, 1992.

ACCORDINGLY, IT IS HEREBY ORDERED, that Petitioner Coy Arthur Hill is not entitled to federal habeas relief under 28 U.S.C. § 2254 and that his petition for a writ of habeas corpus should be

ENTERED ON DOCKET
DATE 9-28-94

dismissed.

SO ORDERED THIS 27th day of September, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ODIS LEE LAWSON, JR.,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-765-E

ORDER

On June 16, 1994, the Three Judge Panel ordered counsel for the individual petitioners to supplement each petition for a writ of habeas corpus to address whether and to what extent the Tenth Circuit opinion in Harris v. Champion, 15 F.3d 1538, 1564-66 (10th Cir. 1994) (Harris II) mooted his habeas corpus claims. The Panel also requested counsel to submit a copy of the decision by the Oklahoma Court of Criminal Appeals.

On August 5, 1994, counsel filed a supplement to the petition in this case and stated that Harris II did moot Petitioner Odie Lee Lawson's habeas corpus claims because he has been discharged from custody. The opinion from the Court of Criminal Appeals, attached to Petitioner's supplement, reveals that Petitioner's conviction was reversed and the case was remanded for a new trial on July 2, 1993.

ACCORDINGLY, IT IS HEREBY ORDERED, that Petitioner Odis Lee Lawson is not entitled to federal habeas relief under 28 U.S.C. § 2254 and that his petition for a writ of habeas corpus should be

ENTERED ON DOCKET
DATE 9-28-94

9

dismissed.

SO ORDERED THIS 27th day of September, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUSSEL GILSTRAP and HELEN GILSTRAP, individuals,	)	
Plaintiffs,	)	
vs.	)	Case No. 94-C-297BU
ST. FARM FIRE AND CASUALTY COMPANY, a corporation.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the Plaintiffs and Defendant and hereby stipulate that the above styled case be dismissed with prejudice. Each party will bear their own costs and fees.

Richard H. Reno, OBA# 10454
Bufogle and Associates
3105 E. Skelly Dr., Suite 600
Tulsa, OK 74105
(918) 743-8598

SELMAN AND STAUFFER, INC.

By: Paul B. Harmon

NEAL E. STAUFFER, OBA #13168
PAUL B. HARMON, OBA #14611

700 Petroleum Club Building
601 South Boulder
Tulsa, OK 74119
(918) 592-7000

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TV BINGO NETWORK, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 94 C-402K
	)	
SBI COMMUNICATIONS, INC.,	)	
SATELLITE BINGO NETWORK, INC.	)	
and RONALD FOSTER,	)	
	)	
Defendants.	)	

STIPULATION OF FINAL JUDGMENT BY CONSENT

THIS MATTER, coming before the undersigned, with the Plaintiff, TV Bingo Network, Inc. ("TVBN"), appearing by and through its attorneys of record, Riggs, Abney, Neal, Turpen, Orbison & Lewis, by Kenneth M. Smith, and the Defendants, SBI Communications, Inc., a corporation, Satellite Bingo Network, Inc., a corporation, and Ronald Foster, an individual ("Defendants"), appearing by and through their attorneys of record, Kilpatrick & Cody, by and through Christopher P. Bussert.

The Court notes that this action was commenced on April 21, 1994, against the Defendants seeking a declaratory judgment under 28 U.S.C. §§2201 and 2202, adjudging that TVBN's Million Dollar TV MegaBingo® created and published as of that date (the "Program") does not infringe upon or violate a certain trademark or certain copyrights of the Defendants. In the Complaint, TVBN seeks further relief from Defendants for the

alleged tortious interference with contractual business relations for which Defendants specifically deny any liability.

The Court, upon consideration of all pleadings and prior proceedings hereto and herein, determines it has jurisdiction of both the parties and the subject matter of this action, pursuant to 28 U.S.C. §1338(a) and (b), and that venue is proper in this Court.

The Court further finds that the parties have stipulated as follows:

1. Based on TVBN's representations which Defendants assume are true and correct, the Program does not infringe upon any rights of the Defendants in Copyright Registration Nos. PAU927-410, PAU847-876, and PAU788-031 or the trademark Satellite Bingo, as registered under U.S. Registration No. 1,473,709.

2. Based on TVBN's representations which Defendants assume are true and correct, the Program does not violate any trade dress rights that any of the Defendants may have in interactive bingo television game show programs which relate to the above-referenced copyrights and trademark.

3. Assuming the Program and the nature of the services of TVBN as generally described in the Complaint in connection therewith are true and correct, TVBN has not misrepresented the nature of its services respecting the Program or engaged in unfair trade practices and/or unfair competition in

connection with its marketing of the Program as of the date this action was commenced.

4. TVBN has undertaken an investigation of Defendants' claim of misappropriation of certain documents, including legal opinions and a business plan of the Defendant Satellite Bingo Network, Inc., by Travis Enterprise, Inc., the predecessor of Gamma International, Inc., and represents that all such documents have been destroyed.

Accordingly, based upon the foregoing stipulations, the parties stipulate that the Court may enter judgment as follows, to-wit:

On Counts I and II, which are, respectively, counts for a declaratory judgment that Plaintiff is not infringing on certain copyrights and the trademark Satellite Bingo of the Defendants, the Court decrees that the Program does not infringe upon Copyright Nos. PAU927-410, PAU847-876, and PAU788-031 or Trademark Registration No. 1,473,709 owned by some or all of the Defendants and that the Plaintiff and its affiliates, vis-a-vis the Defendants, are entitled to distribute, transmit, produce, reproduce, copy, manufacture, use, and sell the Program without interference by the Defendants based on the aforesaid trademark and copyrights and without accounting to the Defendants for any revenue received from the Program relating thereto.

With respect to Count III of the Complaint, which concerned an alleged trade dress violation by the Plaintiff, the Court decrees that the trade dress of the Program does not infringe the trade dress of Defendants' Satellite Bingo program, as represented by Copyright Nos. PAU927-410, PAU847-876, and PAU788-031.

With respect to Count IV of the Complaint concerning the alleged misrepresentation by the Plaintiff of the nature of Plaintiff's services with respect to its Program, the Court decrees that Plaintiff has not misrepresented the nature of its services with respect to the Program.

With respect to Count V of the Complaint regarding the alleged unfair competition of the Plaintiff, the Court decrees that Plaintiff has not engaged in any unfair trade practices and/or unfair competition in connection with Plaintiff's marketing of the Program and that Plaintiff's marketing activities in connection with the Program have not violated any rights of the Defendants as of the date this action was commenced.

The Court further orders, as part and parcel of its decree, that the Defendants are enjoined from charging or threatening to Plaintiff or its exhibitors, distributors or advertisers that the distribution, transmission, production, copying, reproduction, manufacture, use, or sale of the Program

is in violation of or infringes upon Defendants' rights derived from Copyright Nos. PAU927-410, PAU847-876, and PAU788-031 or Trademark Registration No. 1,473,709.

With respect to Count VI of the Complaint wherein the Plaintiff has alleged tortious interference with contractual relations and business relations, the Court notes that the parties have stipulated that each of the Plaintiff's claims, as set forth in Count VI of the Complaint, is to be dismissed with prejudice, and it is so ordered.

The Court further orders that each party hereto is to bear its own costs and attorneys' fees incurred in connection with this action.

DATED this 26 day of September, 1994.

s/ TERRY C. KERN

United States District Judge

AGREED AS TO FORM AND CONTENT:

TV BINGO NETWORK, INC.

By _____

Kenneth M. Smith, OBA #8374
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West 6th Street
Tulsa, Oklahoma 74119-1010
(918) 587-3161

ATTORNEYS FOR PLAINTIFF

(signatures continued on next page)

(signatures continued from preceding page)

SBI COMMUNICATIONS, INC.;
SATELLITE BINGO NETWORK, INC;
and RONALD FOSTER

By: Christopher P. Bussert

Christopher P. Bussert
KILPATRICK & CODY
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309-4530
(404) 815-6500

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 28 1994

Richard M. Lawrence, Clerk
U. S. District Court
NORTHERN DISTRICT OF OKLAHOMA

DOLLAR SYSTEMS, INC., a Delaware corporation,

Plaintiff,

vs.

INTERNATIONAL FRANCHISING SERVICES, LTD., a/k/a INTERNATIONAL FRANCHISING SERVICES, INC., SIGMA FOUR INTERNATIONAL MARKETING, INC., ROBERTO GALOPPI and CECILIA GALOPPI,

Defendants.

Case No. 94-C-33-BU

ENTERED ON DOCKET

DATE SEP 28 1994

ADMINISTRATIVE CLOSING ORDER

As it appears the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

ENTERED this 26th day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 2 [illegible]

Richard M. Lawrence, Clerk
U. S. District Court
NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD VERNON HARRIS and REBA KATHRYN HARRIS,

Plaintiffs,

vs.

OKLAHOMA HORSE RACING COMMISSION, an Administrative Agency of the State of Oklahoma, et al.,

Defendants.

Case No. 93-C-81-BU

ENTERED ON DOCKET

DATE SEP 28 1994

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 26th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FRANK A. LOCKE and RONDA N. LOCKE, Husband and Wife; and RICH JESSINA CHEVROLET, INC., D/B/A FRANK LOCKE CHEVROLET, GEO,

Plaintiffs,

v.

LARRY BROWN; JACK MARSHALL; and PEOPLES STATE BANK, a state banking association,

Defendants.

Case No. 93-C-584-BU

ORDER

This matter comes before the Court upon the Motion for Voluntary Dismissal filed by the plaintiffs, Frank A. Locke and Ronda N. Locke, Husband and Wife, and Rich Jessina Chevrolet, Inc., d/b/a Frank Locke Chevrolet, GEO. The defendant, Peoples State Bank, has responded to the motion and the plaintiffs have replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

The plaintiffs filed their complaint on June 24, 1993. The defendants, Peoples State Bank, Larry Brown and Jack Marshall, responded to the complaint by filing a motion to dismiss or, in the alternative, to stay proceedings pending resolution of a state court action. On August 26, 1993, the plaintiffs requested a conference before the Court. The plaintiffs, in their request, acknowledged that a stay based upon the decision of Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976),

would be appropriate. The plaintiffs stated that they had filed an amended counterclaim in the state court proceedings and that the counterclaim incorporated the claim asserted in this action. In addition, the plaintiffs stated that they and the defendants, Larry Brown and Jack Marshall, had reached an agreement to dismiss this action, but that the defendant, Peoples State Bank, would not so agree. The plaintiffs requested a conference so that the Court could give further directions to the plaintiffs.

Thereafter, on September 15, 1993, the plaintiffs and the defendants, Larry Brown and Jack Marshall, filed a joint stipulation of dismissal. On September 22, 1994, the plaintiffs filed their motion seeking to dismiss their action against the defendant, Peoples State Bank. The Court, on September 27, 1993, entered an order denying the plaintiffs' motion for a conference, dismissing the defendants, Larry Brown and Jack Marshall, pursuant to their stipulation, and staying the balance of the action pending resolution of the state court action. In its order, the Court failed to address the plaintiffs' motion for voluntary dismissal.

On September 2, 1994, this Court lifted the stay and directed the defendant, Peoples State Bank, to respond to the plaintiffs' voluntary dismissal motion. In their response, the defendant requests an award of attorney's fees pursuant to 28 U.S.C. § 1927 prior to any dismissal of the plaintiffs' action. The defendant contends that the plaintiffs have unreasonably multiplied the proceedings between the parties by filing this action and have

burdened the defendant with a defense of an action allegedly having no merit.

The plaintiffs, in reply, argue that their claims have merit. In addition, they contend that they have not acted in bad faith by commencing this lawsuit and then amending their counterclaim in the state court action to add the cause of action alleged herein. The plaintiffs assert that they agreed to stay this action and also proposed to dismiss this action. According to the plaintiffs, the imposition of attorney's fees under 28 U.S.C. § 1927 is not appropriate.

The Court, upon due consideration, concludes that the plaintiffs' motion should be granted. The plaintiffs have amended their counterclaim in the state court action to include the claim in this action. With the amendment, the Court sees no reason why this litigation should continue. The Court also concludes that the defendant's request for attorney's fees pursuant to 28 U.S.C. § 1927 should be denied. In the Court's view, the plaintiffs have not multiplied the proceedings unreasonably and vexatiously so as to require the plaintiffs to satisfy the attorney's fees incurred in defending this action. Once the plaintiffs were granted leave to file an amended counterclaim, they informed the Court that a stay would be appropriate and attempted to obtain a stipulation of dismissal from the defendants. The Court concludes that the plaintiffs' conduct does not warrant the imposition of attorney's fees under 28 U.S.C. § 1927.

Accordingly, the plaintiff's Motion for Voluntary Dismissal (Docket No. 9) is GRANTED. This action is DISMISSED WITHOUT PREJUDICE. The defendant, Peoples State Bank's request for attorney's fees under 28 U.S.C. § 1927 is DENIED.

ENTERED this 26th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STEPHEN P. WALLACE,

Plaintiff,

vs.

WAL-MART STORES, INC., a Delaware Corporation,

Defendant.

Case No. 94-C-168-BU

ENTERED ON DOCKET

DATE SEP 28 1994

JUDGMENT

This action came before the Court upon Defendant's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, Wal-Mart Stores, Inc., a Delaware Corporation, and against Plaintiff, Stephen P. Wallace, and that Defendant, Wal-Mart Stores, Inc., a Delaware Corporation, recover of Plaintiff, Stephen P. Wallace, its costs of action.

Dated at Tulsa, Oklahoma, this 26 day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STEPHEN P. WALLACE,

Plaintiff,

vs.

WAL-MART STORES, CO.,

Defendant.

Case No. 94-C-168-BU

ENTERED ON DOCKET

DATE SEP 28 1994

ORDER

This matter comes before the Court upon the Motion for Summary Judgment of Defendant Wal-Mart Stores, Inc. filed on August 29, 1994. From reviewing the Court file, it appears that Plaintiff has not responded to Defendant's Motion for Summary Judgment within the time prescribed by the Local Rules and has not filed a request for an extension of time to respond to the Motion. Pursuant to Local Rule 7.1(C), the Court therefore deems the Motion confessed.

Having independently reviewed the Motion, the Court finds that no genuine issues of material fact exist and that Defendant is entitled to judgment as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment is GRANTED. Judgment shall issue forthwith.

ENTERED this 26 day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PATTI L. CHRISMAN,

Plaintiff,

vs.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

Defendant.

STATEMENT OF OBJECTION
Opposing counsel *does* not *object* to this motion.

CASE NO. 94-C-150-E

ORDER

Upon the motion of the defendant, Secretary of Health and Human Services, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for additional evaluation of the Plaintiff's past relevant work and a new hearing decision.

DATED this 27th day of September, 1994.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809
(918) 581-7463

ENTERED ON DOCKET
DATE 9-28-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAURA M. BARNES aka LAURA M. JONES aka LAURA M. HARRIS ; THE TULSA DEVELOPMENT AUTHORITY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C-260-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, THE TULSA DEVELOPMENT AUTHORITY, appears by its attorney, Doris Fransein; and the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, TULSA DEVELOPMENT AUTHORITY, acknowledged receipt of Summons and Complaint on March 21, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on around March 22,

ENTERED ON DOCKET
DATE 9-28-94

1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 18, 1994.

The Court further finds that the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 8, 1991, and continuing through July 13, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does know the whereabouts of the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, but due to the circumstances of the property as stated on the Marshal Service; service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with documentary evidence finds that the Plaintiff, United States of America, acting the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the

party served by publication with respect to her present place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 12, 1994; that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, filed its Answer and Cross-Complaint on March 28, 1994; and that the Defendant, LAURA M. BARNES aka LAURA M. JONES aka LAURA M. HARRIS, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Ten (10), Block Seven (7) VALLEY VIEW ACRES ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on April 17, 1979, the Defendant, LAURA M. BARNES, executed and delivered to Charles F. Curry Company, her mortgage note in the amount of $13,650.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the

payment of the above-described note, the Defendant, LAURA M. BARNES, executed and delivered to Charles F. Curry Company, a mortgage dated April 17, 1979, covering the above-described property. Said mortgage was recorded on April 19, 1979, in Book 4393, Page 1953, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 29, 1990, Charles F. Curry Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 10, 1990, in Book 5263, Page 2332, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1990, the Defendant, LAURA M. BARNES, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on October 1, 1991 and May 1, 1992.

The Court further finds that the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, is indebted to the Plaintiff in the principal sum of $18,836.80, plus interest at the rate of Nine and One-Half percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $17.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $8.00 which became a lien on the property as of June 25, 1993; and a claim in the amount of $8.00 for 1993 taxes due. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, has a lien on the property which is the subject matter of this action by virtue of a second Mortgage of the property the amount of $2,619.00 which became a lien on the property as of January 3, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the

Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, in the principal sum of $18,836.80, plus interest at the rate of Nine and One-Half percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $33.00 for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, THE TULSA DEVELOPMENT AUTHORITY, have and recover judgment In Rem in the amount of $2,619.00 with accrued interest at the judgment rate from and after March 1, 1994, plus the attorney's fees in the amount of 392.00.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, LAURA M. BARNES aka Laura M. Jones aka Laura M. Harris, has no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, LAURA M. BARNES aka Laura M. Jones

aka Laura M. Harris, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, THE TULSA DEVELOPMENT AUTHORITY, in the amount of $2,619.00, plus interest at the judgment rate from and after March 1, 1994, plus attorney's fees in the amount of $392.00.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $33.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of

redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

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Assistant United States Attorney
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County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-260-E

NBK:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	FILED
Braden Keith Bartholic; Carolyn Sue Bartholic, fka Carolyn Sue Davis; Beneficial Oklahoma, Inc., fka Beneficial Finance Co. of Oklahoma; Leroy Canfield; Pauline Canfield; Tulsa, Oklahoma, City-County Health Dept.; **COUNTY TREASURER**, Tulsa County, Oklahoma; **BOARD OF COUNTY COMMISSIONERS**, Tulsa County, Oklahoma,	)	SEP 28 1994 Phil M. Lawrence, Clerk U.S. DISTRICT COURT
	)	ENTERED ON DOCKET
	)	DATE SEP 28 1994
Defendants.	)	CIVIL ACTION NO. 94-C-171-B

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28th day of Sept., 1994; previously filed on September 22, 1994, but due to scrivener's error was dated the 22nd day of October 1994.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LEROY CANFIELD, acknowledged receipt of Summons and Complaint on March 2, 1994; that the Defendant, PAULINE CANFIELD, acknowledged receipt of Summons and Complaint on March 2, 1994; that the Defendant, BRADEN KEITH BARTHOLIC, was served with process a copy of Summons and Complaint on August 4, 1994; that the Defendant, CAROLYN SUE BARTHOLIC, was served with process a copy of Summons and Complaint on April 13, 1994; that the Defendant, BENEFICIAL OKLAHOMA, INC., was served with process a copy of Summons and Complaint on April 20, 1994; that the Defendant, TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, was served with process a copy of Summons and Complaint on April 13, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 3, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 28, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on March 21, 1994; and that the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot One (1), Block Two (2), RODDENS RESUBDIVISION OF BLOCK 3, BELFLOWER HEIGHTS ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on December 3, 1980, the Defendant, CAROLYN SUE DAVIS and Michael J. Davis, then husband and wife, executed and delivered to Midland Mortgage Co., a mortgage note in the amount of $21,100.00, payable in monthly installments, with interest thereon at the rate of Thirteen and One-Half percent (13.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CAROLYN SUE DAVIS and Michael J. Davis, then husband and wife, executed and delivered to Midland Mortgage Co., a mortgage dated December 3, 1980, covering the above-described property. Said mortgage was recorded on December 8, 1980, in Book 4514, Page 2117, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 26, 1990, Midland Mortgage Co., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on May 11, 1990, in Book 5252, Page 1410, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1990, the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly

installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, are indebted to the Plaintiff in the principal sum of $33,864.33, plus interest at the rate of Thirteen and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $11.28 fees for service of Summons and Complaint.

The Court further finds that the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, in the principal sum of $33,864.33, plus interest at the rate of Thirteen and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action in the amount of $11.28 fees for service of Summons and Complaint, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or

without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

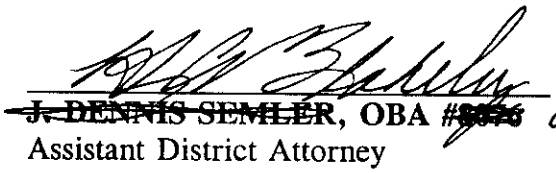
S/ THO[illegible]

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



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Judgment of Foreclosure
Civil Action No. 94-C-171-B

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT M. RAEL,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

ENTERED ON DOCKET
DATE SEP 28 1994

Case No. 93-C-525-B

FILED
SEP 28 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

This matter comes on for consideration of Plaintiff's Complaint seeking judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying Plaintiff's application for disability insurance benefits for the period from and after December 31, 1991, under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq*.

Robert M. Rael, (Plaintiff or claimant) filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on July 26, 1991. Plaintiff's application was denied initially, and again upon reconsideration. After an administrative hearing held on September 8, 1992, the Administrative Law Judge (ALJ) issued a partial favorable decision on October 8, 1992, holding that claimant was disabled during the closed period of December 18, 1989 through December 31, 1991, but not thereafter. The Appeals Council denied the Plaintiff's request for review on April 5, 1993.

3

The Plaintiff filed this action pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative decision to deny benefits under §§216(i) and 223 of the Social Security Act, from and after December 31, 1991. Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir.1978).

Plaintiff sets forth four grounds for reversing the ALJ's denial of benefits:

> 1) The ALJ erroneously rejected the opinion of claimant's treating physician and produced no other substantial evidence.
>
> 2) The ALJ ignored evidence of the side effects of medication.
>
> 3) The ALJ made findings contrary to the requirements of Social Security Ruling 83-12.
>
> 4) The ALJ mischaracterized the testimony of the vocational expert.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id.

§423(d)(1)(A). An individual

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. *See,* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987); Talbot v. Heckler, 814 F2d 1456 (10th Cir.1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir.1983); and Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988). The five steps, as set forth in the authorities above cited, proceed as follows:

> (1) Is the claimant currently working? A person who is working is not disabled. 20 C.F.R. § 416.920(b).
>
> (2) If claimant is not working, does the claimant have a severe impairment? A person who does not have an impairment or combination of impairments severe enough to limit his or her ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).
>
> (3) If the claimant has a severe impairment, does it meet or equal an impairment listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1. A person whose impairment meets or equals one of the impairments listed therein is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
>
> (4) Does the impairment prevent the claimant from doing past relevant work? A person who is able to perform work he or she has done in the past is not disabled. 20 C.F.R. § 416.920(e).

> (5) Does claimant's impairment prevent him or her from doing any other relevant work available in the national economy? A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, at 243; Talbot v. Heckler, at 1460; 20 C.F.R. § 416.920.

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, at 1521; Brown, at 362.

The ALJ followed the five-step approach set forth above and concluded (Tr. 13-21):

> 1) That claimant has not engaged in any substantial gainful activity since the alleged onset date, December 18, 1989 (although claimant attempted to return to work in December, 1990, he only worked for 4 days, and quit because of back pain).
>
> 2) That the claimant has significant impairments (the ALJ found this was consistent with treating physician Dr. Hayes' progress notes but rejected Dr. Hayes overall opinion that claimant was disabled).
>
> 3) That "comparison of claimant's back impairment with section 1.00 et seq. of the Listing of Impairments reveals that it does not specifically satisfy any of the sections of said Listing". Id. at 17.
>
> 4) That claimant cannot perform his past relevant work as cross-country truck driver and construction laborer

since both are "heavy in exertional level". Id. at 20

5) That "Commencing January 1, 1992, the claimant had the residual functional capacity to perform the broad range of sedentary and light level work." The ALJ concluded that claimant, a 34 year old, (which is defined as a younger individual - 20 CFR 404.1568), considering "the types of work which the claimant is functionally capable of performing . . . in combination with his age, education, and work experience, . . . can be expected to make a vocational adjustment to work which exists in significant numbers in the national economy." Id. at 23.[1]

The Secretary determined that under the Social Security Act claimant was disabled for the period beginning December 18, 1989 to and including December 31, 1991. Claimant argues that in order to terminate this established disability the Secretary or his delegate must find "medical improvement in the individual's impairment or combination of impairments" which is related to the individual's ability to work. Id. at §423(f)(1)(A), and that "the individual is now able to engage in substantial gainful activity". Id. at §423(f)(1)(B). Claimant further avers that to facilitate this determination the Secretary has established an eight-part sequential evaluation process for use in termination reviews. 20 CFR §404.1594(f)(1)-(8).

1.Is beneficiary performing any work constituting substantial gainful activity?

2.Does current impairment meet or equal a listed impairment?

3.Has there been medical improvement?

---

[1] The ALJ set forth available sedentary jobs such as assembly worker and machine operator in the following numbers: Regionally - 11,500 and 5,000, respectively; nationally - 91,500 and 39,500, respectively, and light jobs such as delivery driver in the following numbers: Regionally - 8,500; nationally - 67,500.

4.If so, is it related to the claimant's ability to do work, i.e., has there been an increase in the residual functional capacity (RFC) based on the impairment(s) present at the time of the most recent favorable medical determination?

5. If there has been no medical improvement, or if such improvement is not related to claimant's ability to work, do any of the exceptions to medical improvement apply?

6. If the medical improvement is related to ability to do work, or if one of the exceptions found in §404.1594(d)-(e) apply, then are all the current impairments in combination severe?

7.Considering all current impairments, does beneficiary have sufficient RFC to do past relevant work?

8.In addition, considering age, education, and past work experience, does beneficiary have sufficient RFC to perform other work?

Claimant initially charges that the ALJ improperly rejected treating physician Dr. Hayes' opinion that claimant was temporarily totally disabled. Dr. Hayes' rather cryptic evaluation, under date of July 30, 1992, was that claimant "is presently under my care and treatment and he will remain temporarily totally disabled for six months which is approximately until January, 1993." Tr. at 206. There appears to be no contemporary progress or examination notes in the record supporting this evaluation. However, on April 20, 1992, Dr. Hayes had noted:

> "Patient is in today for follow up visit. He seems to be doing quite well. He would function at the light level of activity with limitations of 25 pounds. He is ready to begin Voc Rehab. Work hardening is not indicated as he plans to go back to school. His fusion[2] looks like it has healed satisfactorily. I will see him back in 3 months."

---

[2] Claimant had surgery on August 6, 1991, as follows: Lateral mass fusion, L 2-3 and L 3-4 with iliac bond graft and segmental fixation. Dr. Detweiler performed a decompressive laminectomy at same levels.

Dr. Hayes' previous notes of February 7, 1992, states that claimant "is getting more stiff since he stopped therapy"; that "he remains TTD[3]"; and that Dr. Hayes "think[s] he will have permanent limitations of no bending, stooping or twisting and no lifting over 35 pounds on a repetitive basis." Tr. at 205.

Plaintiff's argument that the ALJ did not give the proper weight to the opinion of the treating physician Dr. Hayes is unpersuasive. While a treating physician's opinion is entitled to extra weight unless it is contradicted by substantial evidence, Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985); Mongeur v. Heckler, 722 F.2d 1033, 1039 (2nd Cir. 1983), it too must be supported by credible evidence and cannot operate in a vacuum. Dr. Hayes own progress notes are sufficient to sustain the ALJ's conclusion that claimant was no longer temporarily totally disabled in that he could "function at the light level of activity with limitations of 25 pounds". The answer to Plaintiff's argument that the ALJ did not give the proper weight to the opinion of the treating physician Dr. Hayes is that he did give it proper weight, merely disagreeing with the doctor's legal conclusion that only being able to "function at the light level of activity with limitations of 25 pounds" made one temporarily totally disabled. Tr. at 205.

The ALJ considered all of the evidence and concluded that Plaintiff could perform sedentary or light work. The findings of

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[3] temporarily totally disabled.

the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). The Court concludes there is substantial evidence to support the ALJ's finding that Plaintiff is able to perform sedentary or light work and further concludes that the ALJ's decision to not rely on Dr. Hayes' ultimate conclusion of July, 1992, that claimant was "temporarily totally disabled" is supported by the record.

The Court next considers claimant's charge that the ALJ ignored evidence of the side effects of medication. The Secretary argues that claimant's progress notes do not contain complaints to his treating physicians of any adverse side effects from medication during the adjudicated period. Further, claimant's own testimony is that he got only about five hours of sleep in an average night without taking the drug Flexeril but that when he takes the drug nightly he can get "a solid sleep". Claimant's testimony that Flexeril makes him feel "very relaxed", without further elaboration, is not shown to be inconsistent with an ability to function at the sedentary or light work level. The drug Soma, taken by claimant two or three time daily when he does not have the responsibility of his children, also "makes me very relaxed" and was last prescribed in March, 1991. The record is devoid of medical testimony which establishes the possible or probable side

effects of Soma[4] and, even coupled with claimant's own opinion that if he would drive after taking Soma "I think my reaction time would be way off" is insufficient to support his argument that the ALJ failed to consider the side effects of the medication claimant was taking.

Claimant's third argument, that the ALJ made findings contrary to the requirements of Social Security Ruling 83-12, is next considered. Claimant argues that a finding that he could perform light and sedentary jobs despite the need to alternate between sitting and standing is contrary to Social Security Ruling 83-12. The Secretary's countering argument is that case law in this circuit establishes that a need to alternatively sit or stand simply means a claimant cannot perform all of the jobs in the range of light work but is not so precluded as to make one disabled, citing Talbot v. Heckler, 814 F.2d 1456, 1463-64 (10th Cir.1987). Recent authority supports the Secretary's position. Straw v. Shalala, No. 93-6174, slip op. at 3-4 (10th Cir. December 14, 1993).

Claimant's fourth argument, that the ALJ mischaracterized the vocational expert's testimony, is troublesome. The ALJ's conclusion that the vocational expert's testimony in response to a hypothetical question supports a finding that claimant, with an ability to perform a broad range of sedentary activity except for repetitively lifting and carrying more than 10 pounds, reduced

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[4] Claimant cites Physician's Desk Reference (46th ed.1992) which is not a part of the record.

ability to bend, stoop, and twist and the need to alternatively sit and stand every half hour, would find jobs available in the regional and national economy is arguably not supported by substantial evidence because the testimony appears to be in conflict. Specifically, the vocational expert testified that:

> A Okay. He was primarily a cross country truck driver, which because he loaded and unloaded trucks on occasion, we put that in the heavy exertional range, 50 to 100 pounds lifting, reaching, handling, fingering and feeling. It's semi-skilled job, and the construction labor, he done only a short period of time. It's heavy and unskilled. And the fireman was over 15 years ago. Just about 15, 15 years ago.
>
> Q All right. Let's so (sic) a hypothetical question about an individual who is 33 years of age, and completed 12th grade, plus the trucking school, truck driving school, and has the past work history you just described. I further find this person could still perform this type light or sedentary work, with these additional restrictions. The primary restrictions is due to back pain, we'll call it moderate to severe back pain, and the primary restrictions are lifting 25 pounds, according to Exhibit 38, also very limited bending, stooping and twisting. Let's say the individual needs to alternate sitting and standing, let's say, every half hour, or at, will. Okay. Okay. With those restrictions, would there be any jobs in the regional or national economy that such a person could perform?
>
> A Okay. There would be sedentary assembly work. There's 183,000 sedentary assembly jobs in the national economy, and 23,000 in this region of Texas, Arkansas, Oklahoma and Louisiana. There's sedentary machine operating jobs, there's like 79,000 in the national economy and 10,000 in this region. There's light delivery driving jobs, there's 135,000 of those in the nation economy, and 17,000 in this region.
>
> Q 135,000?
>
> A Yes. Now, due to the -- that most jobs will require him to -- either a sedentary jobs, will require him to sit six hours out of an eight hour day, or light jobs will require him to stand and walk. I would reduce all those numbers by half as to the jobs that would accommodate being able to alternate sitting and standing

at will. Some of the sedentary, assembly or machine operating would require him to sit two, two and half hours. And as also the light jobs would require him to stand and walk probably more than--

Q More than what?

A Probably more than -- I'm --than, than the alternating at will would accommodate.

Q All right. Let's assume that for the second hypothetical, that all the testimony of the claimant is precisely and accurately true, 100 percent credible, he talks about his back pain, he talks about having trouble sleeping, he does say he can walk a mile on the treadmill, that he takes Flexeril every night to sleep, relax spasms, he can lift up his 15 pound daughter, but not frequently. Frequently he would lift 10 pounds, could sit for 45 minutes, could stand for 20 minutes at a time, he gets moody and blows up at this wife, and all the other restrictions that he mentioned. Let's presume those are all true, would there by any jobs in the regional or national economy that such a person could perform?

A No, there wouldn't. The restrictions that he's testified to would pretty much limit him to sedentary work, and then he wouldn't be able to sit six hours out of an eight hour day. Also his medication would probably interfere with his concentration and ability to carry out any jobs tasks, any jobs that I've named. And, the, the pain appears to be affecting his ability to get along with people, which would further hinder his ability to function in those jobs. And also the sleep disturbance, coupled with the, the pain. And then in his testimony he is -- has stated that he's scheduled to be involved in physical therapy, which usually is on a pretty ongoing regular daily or weekly basis. So, he wouldn't be able to perform any jobs if he was in active medical treatment.

The Court concludes the testimony of the vocational expert is essentially in conflict. The answer to hypothetical question one is that claimant, even with a limitation of having to alternate sitting and standing every half hour or at will, would find jobs available in the regional and national economy. Yet the answer to hypothetical question two appears to be at loggerheads with the first answer.

The Court concludes this matter should be and the same is hereby REMANDED to the Secretary for a rehearing before the ALJ to determine, by the taking of additional testimony from the (or a) vocational expert whether claimant, under a finding of functioning at the sedentary or light work level "except for repetitively lifting and carrying more than 10 pounds, reduced ability to bend, stoop, and twist, and need to alternatively sit and stand every half hour", would find jobs available in the regional and national economy in sufficient numbers.

IT IS SO ORDERED THIS 27th DAY OF September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WILMA M. TURNER,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant.

93-C-0453-E

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed August 31, 1994 in which the Magistrate Judge recommended that the Secretary's Motion to Dismiss should be granted.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 27th day of September, 1994.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 9-28-94

12

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEVELL HILL; SANDRA C. HILL;
STATE OF OKLAHOMA, ex rel,
OKLAHOMA TAX COMMISSION;
STATE OF OKLAHOMA, ex rel,
DEPARTMENT OF HUMAN SERVICES;
IVY WALKER fka IVY GATES;
CITY OF GLENPOOL, Oklahoma;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C-259-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, appears by Sheila Condren; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears through Kim D. Ashley, Assistant General Counsel; and the Defendants, LEVELL HILL and SANDRA C. HILL, IVY WALKER fka Evy Gates, and CITY OF GLENPOOL, Oklahoma, appear not, but make default.

ENTERED ON DOCKET
DATE 9-28-94

The Court being fully advised and having examined the court file finds that the Defendant, LEVELL HILL, was served a copy of Summons and Complaint on May 6, 1994; that the Defendant, SANDRA C. HILL, was served a copy of Summons and Complaint on May 6, 1994; that the Defendant, CITY OF GLENPOOL, Oklahoma, acknowledged receipt of Summons and Complaint on or about March 23, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on March 18, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES acknowledged receipt of Summons and Complaint on March 21, 1994; that the Defendant, IVY WALKER fka Ivy Gates, acknowledged receipt of Summons and Complaint on March 24, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 21, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 18, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 12, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, filed its Answer on March 28, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 7, 1994; and that the Defendants, LEVELL HILL, SANDRA C. HILL, and CITY OF GLENPOOL, Oklahoma, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Six (6), Block One (1), APPALOOSA ACRES, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 26, 1985, the Defendants, LEVELL HILL and SANDRA C. HILL, executed and delivered to Midfirst Mortgage Co., their mortgage note in the amount of $60,671.00, payable in monthly installments, with interest thereon at the rate of Twelve and One-Half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, LEVELL HILL and SANDRA C. HILL, husband and wife, executed and delivered to Midfirst Mortgage Co., a mortgage dated March 26, 1985, covering the above-described property. Said mortgage was recorded on March 29, 1985, in Book 4852, Page 1912, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1985, Midfirst Mortgage Co. assigned the above-described mortgage note and mortgage to Midland Mortgage Co. This Assignment of Mortgage was recorded on May 3, 1985, in Book 4860, Page 999, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1986, Midland Mortgage Co assigned the above-described mortgage note and

mortgage to Trinity Mortgage Co. This Assignment of Mortgage was recorded on March 10, 1986, in Book 4928, Page 1937, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 3, 1987, Trinity Mortgage Co. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 8, 1987, in Book 5050, Page 792, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1987, the Defendants, LEVELL HILL and SANDRA C. HILL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 1, 1988, and December 1, 1989.

The Court further finds that the Defendants, LEVELL HILL and SANDRA C. HILL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, LEVELL HILL and SANDRA C. HILL, are indebted to the Plaintiff in the principal sum of $118,789.94, plus interest at the rate of Twelve and One-Half percent per annum from February 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has liens and a claim on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $19.00 which became a lien on the property as of July 7, 1988; $34.00 which became a lien on the property as of June 25, 1993; $33.00 which became a claim in 1993, plus interest and penalties. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has numerous liens on the property which is the subject matter of this action by virtue of state taxes in the amount of $1,065.05 which became a lien on the property as of July 22, 1985, $1,905.34 which became a lien on the property as of May 28, 1991, $1,816.16 which became a lien on the property as of May 28, 1991, and $2,029.39 which became a lien on the property as of May 28, 1991, plus accrued and accruing interest and penalties. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $11,900.00 which became a lien on the property as of July 16, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, LEVELL HILL, SANDRA C. HILL, IVY WALKER fka Evy Gates, and THE CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, LEVELL HILL and SANDRA C. HILL, in the principal sum of $118,789.94, plus interest at the rate of Twelve and One-Half percent per annum from February 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $1,065.05 for

taxes for the year 1982, plus accrued and accruing interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $19.00 for personal property taxes for the year 1987, plus interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $5,750.89 for taxes for the years 1984 and 1986, plus accrued and accruing interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $34.00 for personal property taxes for the year 1992, plus interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of $11,900.00, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURE, Tulsa County, Oklahoma, have and recover in the amount of $33.00 for personal property taxes for the year 1993, plus interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County,

Oklahoma, LEVELL HILL, SANDRA C. HILL, IVY WALKER fka Evy Gates, and THE CITY OF GLENPOOL, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, LEVELL HILL and SANDRA C. HILL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $1,065.34, plus accrued and accruing interest, and the costs of this action.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of

$19.00, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $5,750.89, plus accrued and accruing interest, and the costs of this action.

Sixth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $34.00, personal property taxes which are currently due and owing.

Seventh:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, in the amount of $11,900.00.

Eighth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $33.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

for

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Department of Human Services

Judgment of Foreclosure
Civil Action No. 94-C-259-E

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM POTTS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-727-E

ORDER

On June 16, 1994, the Three Judge Panel ordered counsel for the individual petitioners to supplement each petition for a writ of habeas corpus to address whether and to what extent the Tenth Circuit opinion in Harris v. Champion, 15 F.3d 1538, 1564-66 (10th Cir. 1994) (Harris II) mooted his habeas corpus claims. The Panel also requested counsel to submit a copy of the decision by the Oklahoma Court of Criminal Appeals.

On August 5, 1994, counsel filed a supplement to the petition in this case and stated that Harris II did moot Petitioner William Potts's habeas corpus claims because he has been discharged from custody. The opinion from the Court of Criminal Appeals, attached to Petitioner's supplement, reveals that Petitioner's conviction was reversed and the case was remanded for a new trial on January 7, 1993.

ACCORDINGLY, IT IS HEREBY ORDERED, that Petitioner William Potts is not entitled to federal habeas relief under 28 U.S.C. § 2254 and that his petition for a writ of habeas corpus should be

ENTERED ON DOCKET
DATE 9-28-94

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dismissed.

SO ORDERED THIS 27th day of September, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ANGELA LAWHEAD,

Plaintiff,

vs.

ROGER NUNLEY, an individual; McKEE DEVELOPMENT CORP., an Oklahoma Corporation; CHRIS McKEE, an individual; and AMERICAN BANK AND TRUST CO., an Oklahoma Corporation,

Defendants.

Case No. 94-C-775-BU

ORDER

On August 9, 1994, the defendants, McKee Development Corp. and Chris McKee removed the above-entitled action to this Court from the District Court of Tulsa County, Oklahoma. In their notice of removal, the defendants asserted that the plaintiff had pleaded a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and that removal was proper under 28 U.S.C. § 1441(a). On that same date, the defendants also filed a motion seeking to dismiss the above-entitled action on the basis that the plaintiff had failed to exhaust her administrative remedies as required by Title VII. The plaintiff, Angela Lawhead, in response, filed a motion seeking to remand this action to the District Court of Tulsa County, Oklahoma. In her motion, the plaintiff asserts that she has not alleged a claim against the defendants under Title VII; rather, she has alleged a claim under state law. The defendants have objected to the plaintiff's motion.

Upon review of the parties' submissions and the plaintiff's

petition, the Court concludes that the plaintiff is not alleging a Title VII claim against the defendants. Although the facts in the petition might give rise to a claim under Title VII, the Court finds that the plaintiff is not pursuing relief from the defendants under such statute. As the plaintiff is relying exclusively upon state law for her claim against the defendants, the Court finds that it lacks subject matter jurisdiction over this action and that this action must be remanded to the District Court of Tulsa County, Oklahoma. 28 U.S.C. § 1447(c).[1]

Accordingly, the plaintiff's Motion to Remand (Docket No. 6) is GRANTED. The Motion to Dismiss of McKee Development Corp. and Chris McKee (Docket No. 4) is declared MOOT. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 26th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

[1]By remanding this action to the state court, the Court has not made a determination as to the merits of the plaintiff's claim against the defendants. The Court believes that such determination should be made by the state court.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

VERNELL DAVIS,

Plaintiff,

vs.

McDONNELL DOUGLAS CORPORATION,

Defendant.

Case No. 93-C-619-BU

JUDGMENT

This matter came before the Court upon Defendant, McDonnell Douglas Corporation's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant, McDonnell Douglas Corporation, and against Plaintiff, Vernell Davis, and that Defendant, McDonnell Douglas Corporation, recover from Plaintiff, Vernell Davis, its costs of action.

ENTERED this 26th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VERNELL DAVIS,)
Plaintiff,)
vs.) Case No. 93-C-619-BU
McDONNELL DOUGLAS CORPORATION,)
Defendant.)

ORDER

This matter comes before the Court upon the motion of Defendant, McDonnell Douglas Corporation, for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Plaintiff, Vernell Davis, has responded to the motion and Defendant has replied thereto. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. Defendant, an aerospace manufacturer, formerly operated a subassembly facility in Tulsa, Oklahoma. Defendant's Exhibit "B".

2. In June, 1990, John McDonnell, Defendant's president, announced a company-wide cost cutting program which was designed to reduce expenses by $700,000,000.00. A significant percentage of the cost-cutting effort would occur through labor reduction. Defendant's Exhibits "C" & "B".

3. Major layoffs began at the Tulsa facility in August, 1990. Over 1,700 employees were laid off between August, 1990 to December, 1993. On December 3, 1993, Defendant announced the complete closing of the Tulsa facility. Defendant's Exhibit "B".

4. On August 10, 1987, Plaintiff, a black female, was hired

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by Defendant to work as a painter processor. Defendant's Exhibit "A".

5. Plaintiff thereafter obtained the job of Blueprint Clerk "B" with Defendant on October 21, 1989. As a Blueprint Clerk "B," Plaintiff assisted customers, retrieved prints that were needed, reordered prints, and made sure prints were kept up to date. Defendant's Exhibits "A" & "D".

6. Plaintiff, along with other "B" Clerks, was subsequently promoted to Blueprint Clerk "A". Defendant's Exhibit "A".

7. At all times relevant to this action, Plaintiff was a member of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") and Local No. 1093 of the UAW. Defendant's Exhibit "D".

8. As a union member, Plaintiff was covered by a collective bargaining agreement which governed her wages, hours, layoffs, recalls, grievances, seniority and other working conditions. Defendant's Exhibit "D".

9. On April 30, 1992, Carol "Noeda" Pilkenton, a white female and a former employee of Defendant who had been laid off, filed a grievance with Defendant. Pilkenton had previously held the position of Blueprint Clerk "B". In the grievance, Pilkenton charged that "A" Clerks were daily, regularly and routinely performing the work of "B" Clerks. Defendant's Exhibit "E".

10. In response to the grievance, Sharon Moyer, Manager of Compensation and Benefits for Defendant, investigated the work performed by the Blueprint Clerks. She concluded that virtually

all of the work performed by the Blueprint Clerks was "B" work. Defendant's Exhibit "F".

11. Defendant answered Pilkenton's grievance by making adjustments in the classifications, and by bringing Pilkenton back with three weeks of back pay and allowing her to displace the least senior Blueprint Clerk "B". Defendant's Exhibit "E".

12. The answer of Defendant to the Pilkenton grievance was acceptable to the UAW. Defendant's Exhibit "E".

13. On June 15, 1992, all the Blueprint Clerks designated as "A" were demoted to "B". Defendant's Exhibit "A".

14. On June 16, 1992, Pilkenton exercised her right under the collective bargaining agreement to bump into the Blueprint Department. Plaintiff, who had the least seniority in the department, was laid off to give Pilkenton a "B" position. Defendant's Exhibits "A", "G" and "B".

15. On June 21, 1994, Plaintiff filed a grievance challenging her layoff. This grievance was later supplemented by a letter of July 15, 1992, written by Plaintiff. Defendant denied the grievance and the union appealed the decision to arbitration. Plaintiff's grievance was later withdrawn. Defendant's Exhibits "I", "J", & "K".

16. Plaintiff's layoff and Pilkenton's recall left the Blueprint Department with four (4) white employees and three (3) black employees as opposed to three (3) white employees and four (4) black employees. Defendant's Exhibits "B" and "H".

17. In addition to Plaintiff, two other black females were

reclassified to the position of a "B" Clerk. The employees did not get laid off as they had greater seniority than Plaintiff. Defendant's Exhibit "D".

18. Pilkenton went on medical leave of absence shortly after her reinstatement and later retired in August of 1992. Pilkenton benefitted financially by coming back to work and then retiring, as the benefits available to a retiree were superior to those available to a laid off employee. Defendant's Exhibit "B".

19. Defendant did not replace Pilkenton because of a decline in work to be performed. Defendant's Exhibit "B".

20. Four of the remaining Blueprint Department employees filed grievances over the reclassification of all Department employees to the "B" classification, which they felt violated the collective bargaining agreement. Defendant denied the grievances and the union appealed the grievances to arbitration. Defendant and UAW Local No. 1093 were ultimately able to negotiate a settlement of the grievances filed, which provided that when employees classified as "B" Clerks were above the minimum rate of an "A" Clerk, the employees would be reclassified as an "A" Clerk. Three of the employees were reclassified as "A" Clerks and one employee was given a rate adjustment. Both black employees and white employees approved of the points negotiated and agreed to by Defendant and Local No. 1093. Defendant's Exhibits "L", "M", "N", "O", "P" & "Q".

21. A white female employee was laid off from the Blueprint Department on January 13, 1993. If Plaintiff had not been laid off

in June of 1992, she, rather than the white female, would have been laid off based upon the seniority system. Defendant's Exhibit "D".

22. Prior to the filing of Pilkenton's grievance, a grievance was filed by another employee, Michelle Wood. An amendment to the grievance challenged the practice of a Blueprint Clerk "A" doing the work of Blueprint Clerk "B". At the time of the grievance, Rhonda Evans, a white female, had the least seniority in the Blueprint Department. Defendant's Exhibits "S" & "D". Wood's grievance was denied as untimely. Defendant's Exhibit "B".

23. Plaintiff filed a written charge of race discrimination with the Oklahoma Human Rights Commission and the Equal Employment Opportunity Commission. The EEOC's determination dated April 1, 1993, which decided adversely to Plaintiff, was mailed on April 6, 1993. Defendant's Exhibit "A".

24. On July 6, 1993, Plaintiff filed her complaint. Defendant's Exhibit "A".

Plaintiff brings this action against Defendant alleging intentional racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. Plaintiff claims that she was reclassified as a Blueprint Clerk "B" and then laid off because of her race. Defendant denies that it discriminated against Plaintiff in any manner. Defendant argues that the decision to reclassify Plaintiff as well as the other employees in the Blueprint Department was in response to the grievance filed by Pilkenton.

At the outset, the Court rejects Defendant's contention that

Plaintiff's action should be barred because it was not commenced within 90 days of the notice of the EEOC's determination. The envelope in which the EEOC's determination was mailed reveals a mailing date of April 6, 1993. Even if the envelope, which was mailed from Dallas, Texas, reached Plaintiff on that same date, Plaintiff, to comply with the 90-day time period, had to file her complaint by July 5, 1993. According to the calendar, July 5, 1993 was a legal holiday. With the Court Clerk's office closed, Plaintiff had until July 6, 1993 to file her complaint. Since the complaint was filed on July 6, 1993, the Court finds that this action was timely filed.

Even though Plaintiff's action is timely, Defendant, in its motion, contends that summary judgment is still appropriate because the evidence fails to establish that Defendant discriminated against Plaintiff based upon her race. Defendant argues that there are no facts to support Plaintiff's allegations that she was reclassified as a Blueprint Clerk "B" because she was black.

Title VII makes it an unlawful employment practice to discharge or otherwise discriminate against any individual on the basis of race with respect to compensation, terms, or conditions or privileges of employment. 42 U.S.C. 2000e-2(a)(1). Plaintiff has the initial burden of establishing by a preponderance of the evidence a "prima facie" case of race discrimination. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993). If Plaintiff establishes a prima facie case, a presumption of discrimination exists. Id. The burden then shifts to Defendant to articulate

legitimate, non-discriminatory reasons for its employment action. Id. If Defendant sustains its burden of production, the presumption of discrimination is rebutted. Plaintiff must then demonstrate that the proffered reasons were not the true reasons for the employment action and that race was. Id. The ultimate burden of persuasion remains on Plaintiff to prove that she has been a victim of intentional racial discrimination. Id. at 2747-49.

In its motion, Defendant contends that Plaintiff cannot establish a prima facie case of racial discrimination. However, even if Plaintiff can establish a prima facie case, Defendant contends that Plaintiff cannot satisfy her ultimate burden of persuasion that Defendant intentionally discriminated against her. Defendant contends that the undisputed evidence establishes that Plaintiff was reclassified to a "B" Clerk and then laid off because of the grievance filed by Pilkenton. According to Defendant, Plaintiff's lack of seniority rather than her race led to her layoff. Defendant further contends Plaintiff's argument that her reclassification and layoff was discriminatory because Wood's grievance was not acted upon is mere conjecture. Defendant contends that the undisputed evidence establishes that Wood's grievance was denied as untimely. Furthermore, Defendant contends that Plaintiff was not put in another job nor recalled to her former position after Pilkenton retired because of the layoffs

that were occurring at the Tulsa facility.[1]

Plaintiff, in response, contends that summary judgment is not appropriate because serious doubts exist concerning the reasons advanced by Defendant for its employment decision. Plaintiff contends that the Defendant's financial condition was not as bad as indicated in Robn Werner's affidavit submitted as Defendant's Exhibit "B". Plaintiff contends that a layoff would not have happened in the Blueprint Department except for discriminatory reclassification of her position. According to Plaintiff, her job continued to remain open after Pilkenton retired. Plaintiff also contends that Defendant was not forced to reclassify the positions in the Blueprint Department due to Pilkenton's grievance because it was not required to do so based upon Wood's grievance. Plaintiff argues that Wood's grievance was not denied as untimely since none of the records surrounding the grievance indicate that it was untimely. Finally, Plaintiff contends that the Letter of Understanding reached between Defendant and the union did not benefit all black employees because she was not recalled to her position and restored to her classification as an "A" Clerk like the other employees.

Having reviewed the evidence, the Court concludes that summary

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[1] Defendant, in its motion, also argues that its use of the seniority system established in the collective bargaining agreement to lay Plaintiff off from her job was not discriminatory. Plaintiff, in response, contends that she has not alleged that she was discriminated against by Defendant because of its use of the seniority system. Thus, since it appears that the use of the seniority system is not an issue between the parties, the Court will not address it.

judgment is appropriate. Plaintiff has failed to show that Defendant's decision to reclassify Plaintiff, which led to her layoff, was based upon her race. Plaintiff has not presented any evidence to controvert the fact that Pilkenton's grievance caused the reclassification. Plaintiff has argued that Defendant could not have relied upon Sharon Moyer's evaluation to reclassify Plaintiff because it was not in writing until August of 1992. Plaintiff, however, has presented no evidence to establish that Ms. Moyer's evaluation was not done in May of 1992 as stated in her August memorandum. Defendant's response to Pilkenton's grievance on June 15, 1994, in fact, states that Defendant had reviewed the work in question and would make the proper adjustments. The adjustments resulted in the reclassification of Blueprint Department employees. Defendant's answer to Pilkenton's grievance was found acceptable by the union.

In addition, Plaintiff has failed to present any evidence to refute the sworn statement of Robn Werner that Michelle Wood's grievance was denied as untimely. Plaintiff states that Wood's grievance file has no documentation of untimeliness and thus, untimeliness could not be the reason for the denial of Wood's grievance. However, Plaintiff provides no evidence to controvert the sworn statement of Werner that Wood's grievance was disposed of because it was untimely.

Plaintiff further has failed to present any evidence to show that her position with Defendant remained open after her layoff and that her layoff was not economically motivated. The undisputed

evidence demonstrates that neither Plaintiff nor any other employee was given Pilkenton's position after she took medical leave and retired because the work available had declined. The fact that Plaintiff would have been laid off in January of 1993 if not laid off in June of 1992 because an employee with more seniority than Plaintiff was laid off does not support Plaintiff's argument that her position remained open.

The Court concludes, from reviewing the record, that Plaintiff has failed to present sufficient evidence to raise a genuine issue of fact for trial as to whether Defendant's proffered reasons were not the true reasons for its employment decision and as to whether Defendant's employment decision was motivated by Plaintiff's race. The Court concludes that reasonable jurors could not differ from the evidence in the record that Plaintiff was reclassified as a "B" Clerk due to Pilkenton's grievance and that she was laid off due to her seniority status.[2]

Based upon the foregoing, Defendant McDonnell Douglas Corporation's Motion for Summary Judgment (Docket No. 29) is GRANTED. Judgment shall issue forthwith.

ENTERED this 26th day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

[2] In light of the Court's findings, it is not necessary to address the issues of reinstatement and back pay raised by Defendant's motion.

blc OBA #5026

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BILL E. DOWELL and LINDA A. DOWELL,	)	
Plaintiffs,	)	
-vs-	)	No. 93-C-497-B
FARMERS INSURANCE COMPANY, INC., a corporation,	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

On this 27th day of Sept., 1994, the Joint Application of the parties for an Order of Dismissal With Prejudice came on before the Court for hearing. The Court finds that the parties have settled all issues and that the case should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above captioned matter is dismissed with prejudice to refiling herein.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

DOUGLAS W. WILSON
BENJAMIN P. ABNEY
Attorneys for Plaintiffs

DENNIS KING
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STEVE M. BRUNER;	)	
TAMMY M. BRUNER;	)	
CITY OF BROKEN ARROW, Oklahoma	)	
COUNTY TREASURER, Tulsa County,	)	
Oklahoma;	)	SEP 27 1994
BOARD OF COUNTY COMMISSIONERS,	)	
Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 94-C-579-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma; and the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, STEVE M. BURNER and TAMMY M. BRUNER, were served with process a copy of Summons and Complaint on July 26, 1994; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on June 7, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their answers on July 13, 1994; the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its answer on June 28, 1994; and the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Seventeen (17), Block Five (5), ARROW SPRINGS PARK, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

The Court further finds that on December 1, 1988, the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, executed and delivered to Inland Mortgage Corporation, their mortgage note in the amount of $48,253.00, payable in monthly installments, with interest thereon at the rate of Eight and Seven-Eighths percent (8.875%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, husband and wife, executed and delivered to Inland Mortgage Corporation, a mortgage dated December 1, 1988, covering the above-described property. Said

mortgage was recorded on December 6, 1988, in Book 5144, Page 331, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 1, 1988, Inland Mortgage Corporation, assigned the above-described mortgage note and mortgage to Government National Mortgage Association. This Assignment of Mortgage was recorded on July 12, 1991, in Book 5334, Page 2575, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 2, 1991, Government National Mortgage Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 12, 1991, in Book 5334, Page 2576-A, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1991, the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on January 1, 1992 and March 1, 1993.

The Court further finds that the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has

continued, and that by reason thereof the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, are indebted to the Plaintiff in the principal sum of $61,158.48, plus interest at the rate of Eight and Seven-Eighths percent per annum from May 16, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a claim against the property which is the subject matter of this action by virtue of personal property taxes in the amount of $36.00 for 1993 taxes. Said claim is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, in the principal sum of $61,158.48, plus interest at the rate of Eight and Seven-Eighths percent per annum from May 16, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $36.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, STEVE M. BRUNER and TAMMY M. BRUNER, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $36.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 94-C-579-B

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVELYN MAXINE DYE,

Plaintiff,

vs.

KENTUCKY FRIED CHICKEN, INC., a corporation, and UNITED STATES FIDELITY & GUARANTY COMPANY,

Defendants.

No. 93-C-0973-B

DATE SEP 27 1994

JUDGMENT

In keeping with the Order sustaining the motion for summary judgment of Defendant, Kentucky Fried Chicken, Inc. (also Kentucky Fried Chicken of California, Inc.), entered this date, judgment is hereby entered in favor of Kentucky Fried Chicken, Inc. (properly identified as Kentucky Fried Chicken of California, Inc.), and against the Plaintiff, Evelyn Maxine Dye, and Plaintiff's action is hereby dismissed. Costs are awarded in favor of said Defendant if timely applied for pursuant to Local Rule 54.1. The parties are to pay their own respective attorney's fees.

DATED this 27th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVELYN MAXINE DYE,

Plaintiff,

vs.

KENTUCKY FRIED CHICKEN, INC., a corporation, and UNITED STATES FIDELITY & GUARANTY COMPANY,

Defendants.

No. 93-C-0973-B

ENTERED ON DOCKET

DATE SEP 27 1994

FILED

SEP 27 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

The Court has for decision the motion for summary judgment pursuant to Fed.R.Civ.P. 56 (Docket #13) of the Defendant, Kentucky Fried Chicken, Inc., more accurately referred to as Kentucky Fried Chicken of California, Inc ("KFC"). The uncontroverted facts revealed by the record are as follows:[1]

1. Plaintiff, Evelyn Maxine Dye ("Dye"), alleges that while on the premises of Defendant, KFC, Plaintiff was about to enter the

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[1]Local Rule 56.1B states:

> "The response brief to a motion for summary (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

Plaintiff did not follow the format required by this local rule in her response.

restaurant and was approached by a vehicle and became "justifiably startled" and fell on the curb near the entrance of the store. (See Plaintiff's original Petition/Complaint, p. 2, previously filed herein, hereinafter "Petition.").

2. Plaintiff alleges that KFC was negligent and acted with reckless disregard in "maintaining a drive-thru exit within close proximity to the entrance door of the restaurant." (See "Petition" p. 2).

3. Plaintiff alleges that the proximity of the drive-thru with the entrance of the restaurant was a "dangerous condition" and that such "dangerous condition" in combination with the acts of the driver of the vehicle, are the sole and proximate cause of Plaintiff's injuries. (See "Petition", p. 2).

4. Plaintiff testified in deposition that the KFC restaurant, parking lot, drive-thru, curb area, and entry-way are all depicted as they were at the time of the subject incident, in eight photographs which were marked for identification as Exhibit Nos. "1 through 4" at Plaintiff's deposition. (See Deposition transcript of Evelyn Maxine Dye, hereinafter "E.M. Dye Depo.," p. 55, l. 13-25; p. 56, l. 1-10).

5. After Plaintiff and her husband parked their car at the KFC parking lot, Plaintiff was some 50 feet from the subject entrance; Plaintiff had a clear view of the building and a clear view of the entrance going to the door.. (See E.M. Dye Depo., p. 10, l. 4-25; p. 11, l. 1-7).

6. Plaintiff had a clear view of the entire side of the KFC

building. (See E.M. Dye Depo., p. 10, l. 24-25; p. 11, l. 1-2).

7. As Plaintiff approached the KFC building, she saw the curb that was adjacent to the sidewalk near the door that she was going to enter. (See E.M. Dye Depo., p. 11, l. 3-15).

8. There was no obstruction of Plaintiff's view to the drive-thru, the curb, or the approach to the building. (See E.M. Dye Depo., p. 65, l. 2-9, p. 67, l. 23-25).

9. The Plaintiff actually saw the curb before she attempted to step up to or onto it. (See E.M. Dye Depo., p. 68, l. 1-6).

10. Plaintiff saw the curb prior to seeing the subject vehicle and at that time she was approximately five or six inches from the curb. (See E.M. Dye Depo., p. 68, l. 19-25; p. 69, l. 1-25; p. 70, l. 1).

11. As Plaintiff was "beginning to step on the curb, a car turned the corner very fast and startled her." Plaintiff did not step high enough to get onto the curb and "consequently" Plaintiff "fell." (See E.M. Dye Depo., p. 21, l. 10-22).

12. Plaintiff only saw the vehicle for a "split second" and never saw the vehicle again. (See E.M. Dye Depo., p. 35, l. 7-11).

13. The identity of the vehicle and driver is unknown to the Plaintiff. (See E.M. Dye Depo., p. 35, l. 7-25; p. 36, l. 1-3).

14. Plaintiff concluded that had she not seen the vehicle come around the corner, she would not have had any difficulty getting up onto the sidewalk. (See E.M. Dye Depo., p. 81, l. 17-20).

15. Plaintiff testified that the reason she fell was that as

she was beginning to step up onto the curb a car came around the southeast corner of the building at what she thought was a fast rate of speed, startling her, causing her to misstep. (See E.M. Dye Depo., p. 21, l. 10-22; p. 49, l. 21-25; p. 50, l. 1-3).

16. Plaintiff did not say anything to KFC personnel regarding the involvement of the car, although she did report the incident of her fall to KFC. (See E.M. Dye depo., p. 36, l. 20-25; p. 37, l. 1-5).

17. Mr. Robert George Dye, Plaintiff's husband who was with her at the time of the subject incident, testified that the only time he remembers seeing the vehicle was when it was coming around the corner of the building. (George Dye Depo., p. 21, l. 105).

18. Mr. Dye does now know whether the car was behind the building when he heard it, but he thinks that part of the car was just visible around the corner of the building when he saw it. (See George Dye Depo., p. 16, l. 15-23).

19. Mr. Dye never saw the car go all the way around the corner of the building. (See George Dye Depo., p. 16, l. 24-25; p. 17, l. 1).

20. Plaintiff's expert witness, Dr. Robert Harner, testified that a hazard is created when the drive-thru exit and the pedestrian entrance are at the same place because it mixes pedestrian and vehicular traffic. (See Robert E. Harner Depo., p. 60, l. 7-12).

21. Harner testified that such things as a crosswalk, guard-rail, speed limit signs, and pedestrian crossing signs could serve

as appropriate warnings to drivers and pedestrians relative to safe crossing areas. (Robert E. Harner Depo., p. 61-62, l. 20-25, 1-10; p. 83, l. 4-15; p. 91, l. 4-10; p. 92, l. 10-11; p. 93, l. 4-15, l. 18-19; p. 96, l. 9-10, 12).

22. Plaintiff's expert, Robert Harner, testified that a vehicle on the south side of the KFC building, just starting to come around on the east side of the building (as Plaintiff described) would not be a hazard to an individual entering the KFC entrance on the east side of the building. (Robert E. Harner Depo., p. 78, l. 9-25; p. 79, l. 1-13).

23. Harner testified that there would be no obligation on the part of the premises owner to warn a pedestrian in the scenario set forth in Paragraph No. 22. (Robert E. Harner Depo., p. 79, l. 14-23).

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the moving party can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Legal Analysis and Conclusion

The undisputed facts reveal that the KFC parking area, drive-

thru, curbing and entrance door were all open and obvious. (See Photographs, Exhibit C to Defendant KFC's Brief in support of Motion for Summary Judgment, filed July 1, 1994). Plaintiff did not have to be warned of the drive-thru as it was obvious with large yellow lane arrows and the canopy attached to the building. Nicholson v. Thacker, 512 P.2d 156 (Okla. 1973), and Safeway Stores, Inc. v. McCoy, 376 P.2d 285 (Okla. 1962). The automobile coming around the southeast corner of the building (approximately 40 to 50 feet away) that startled Plaintiff was said to be traveling 12 to 14 miles per hour. (Exhibit E to Motion of Defendant U.S.F.& G. for Summary Judgment and Supporting Brief, filed May 26, 1994, George Dye Depo., p. 37, l. 5-14). The record does not reveal what the subject automobile did after it appeared at the corner of the building, i.e., whether it proceeded down the drive-thru lane or proceeded in another direction.

This case is analogous to the case of Booth v. Warehouse Market, 286 P.2d 721, 724 (Okla. 1955). Therein the Oklahoma Supreme Court said the proprietor's design of the vehicle parking and travel area had "merely furnished a condition by which the injury was possible and a subsequent independent act caused the injury." The existence of the condition (the design of the parking lot and drive-thru) was not the proximate cause of Plaintiff's injury. *See also*, Phillips Petroleum Co. v. Robertson, 247 P.2d 501 (Okla. 1952); Pepsi Cola Bottling Co. of Tulsa, Oklahoma v. Von Brady, 386 P.2d 993, 996 (Okla. 1964); Gaines v. Providence Apartments, 750 P.2d 125, 126-27 (Okla. 1988); Johnson v. Mid-South

Sports, Inc., 806 P.2d 1107 (Okla. 1991); Lingerfelt v. Winn-Dixie Texas, Inc., 645 P.2d 485 (Okla. 1982); and Shircliff v. Kroger Co., 593 P.2d 1101 (Okl.App. 1979). Failure to provide a handrail under such circumstances is not negligence. Pruitt v. Timme, 349 P.2d 4 (Okla. 1960).

Where the material facts are not in dispute, as here, proximate cause is an issue of law for the court. Pepsi Cola Bottling Co. of Tulsa, Oklahoma, 386 P.2d at 996, and Johnson, 806 P.2d 1107.

Where the facts are not in dispute, as here, Plaintiff's expert testimony cannot create a factual proximate cause issue when it is clear Defendant's conduct created a condition amounting to at best only a remote cause. *See*, Hall v. Belmon, 935 F.2d 1106 (10th Cir. 1991); Tatum v. Phillip Morris, Inc., 809 F.Supp. 1452 (W.D.Okla. 1992); U.S. v. Hartage, 733 F.Supp. 1424 (W.D.Okla. 1989); and Downs v. Longfellow, 351 P.2d 999 (Okla. 1960).

For the reasons stated above, the motion for summary judgment pursuant to Fed.R.Civ.P. 56 of Kentucky Fried Chicken Inc. (also Kentucky Fried Chicken of California, Inc.), is hereby SUSTAINED, and a separate Judgment in favor of said Defendant and against the Plaintiff, Evelyn Maxine Dye, is entered herewith.

IT IS SO ORDERED this 27th day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DENNIS P. HOLDEN;	)	
CHRISTINA L. HOLDEN;	)	
STATE OF OKLAHOMA, ex rel.	)	
OKLAHOMA TAX COMMISSION;	)	
COUNTY TREASURER, Tulsa County,	)	
Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS,	)	
Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 94-C-540-B**

FILED
SEP 27 1994
Phil Lawrence, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 27 1994

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, DENNIS P. HOLDEN, was served a copy of Summons and Complaint on July 12, 1994 by Marshal Service, the Defendant, CHRISTINA L. HOLDEN, was served a copy of Summons and Complaint on July 12, 1994, by Marshal Service; that

the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on or about May 27, 1994 by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 13, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on June 2, 1994; and that the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, have failed to answer and default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-one (21), Block Eight (8), SUMMERFIELD, an Addition to the City and County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on May 23, 1988, the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, executed and delivered to Central Mortgage Corporation, their mortgage note in the amount of $56,986.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DENNIS P.

HOLDEN and CHRISTINA L. HOLDEN, husband and wife, executed and delivered to Central Mortgage Corporation, a mortgage dated May 23, 1988, covering the above-described property. Said mortgage was recorded on May 31, 1988, in Book 5102, Page 2034, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 23, 1988, Central Mortgage Corporation, assigned the above-described mortgage note and mortgage to The Florida Group, Inc. This Assignment of Mortgage was recorded on May 31, 1988, in Book 5102, Page 2039, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 3, 1988, The Florida Group, Inc., assigned the above-described mortgage note and mortgage to SCG Mortgage Corporation. This Assignment of Mortgage was recorded on June 22, 1988, in Book 5109, Page 110, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 13, 1989, SCG Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 15, 1989, in Book 5189, Page 317, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 1, 1989, the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding

agreements were reached between these same parties on January 1, 1990, October 1, 1990, September 1, 1991, and June 1, 1992.

The Court further finds that the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, are indebted to the Plaintiff in the principal sum of $75,302.26, plus interest at the rate of Eight and One-Half percent per annum from May 13, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $52.00, plus accrued and accruing interest, which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state taxes in the amount of $2,106.57, plus accrued and accruing interest, which became a lien on the property as of November 19, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, in the principal sum of $75,302.26, plus interest at the rate of Eight and One-Half percent per annum from May 13, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $52.00 for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $2,106.57, plus accrued and accruing interest, for state taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, DENNIS P. HOLDEN and CHRISTINA L. HOLDEN, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $52.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $2,106.57, plus accrued and accruing interest, state taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-540-B

NBK:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
C.B. DICKINSON	)
aka Clarence Ben J. Dickinson	)
aka Clarence B. Dickinson	)
aka Clarence Benjamin Dickinson;	)
aka Jack Dickinson;	)
LINDA K. DICKINSON	)
aka Linda Dickinson	)
aka Linda Kaye Dickinson;	)
SERVICE COLLECTION	)
ASSOCIATION, INC.;	)
TULSA ADJUSTMENT BUREAU, INC.	)
COUNTY TREASURER, Tulsa County,	)
Oklahoma;	)
BOARD OF COUNTY COMMISSIONERS,	)
Tulsa County, Oklahoma,	)
	)
Defendants.	) **CIVIL ACTION NO. 94-C-652-E**

FILED
SEP 26 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, SERVICE COLLECTION ASSOCIATION, INC., appears by it attorney, Fred A. Pottorf; the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, appear by their attorney, Eddie Ramirez; and the Defendant, TULSA ADJUSTMENT BUREAU, INC., appears not having previously filed a Disclaimer.

ENTERED ON DOCKET
DATE 9-27-94

The Court being fully advised and having examined the court file finds that the Defendant, C.B. DICKINSON, signed a Waiver of Summons on July 27, 1994, filed on July 28, 1994; that the Defendant, LINDA K. DICKINSON, signed a Waiver of Summons on July 27, 1994, filed on July 28, 1994; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., signed a waiver of Summons on July 13, 1994, filed on July 14, 1994; that Defendant, TULSA ADJUSTMENT BUREAU, INC., signed a Waiver of Summons on July 6, 1994, filed on July 11, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 26, 1994; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on July 13, 1994; the Defendant, TULSA ADJUSTMENT BUREAU, INC., filed its Disclaimer on July 5, 1994; and that the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, filed their Entry of Appearance and Disclaimer on August 9, 1994.

The Court further finds that the Defendant, C.B. DICKINSON, is one and the same and sometimes referred to as Clarence Ben J Dickinson, Clarence B. Dickinson, Clarence Benjamin Dickinson and Jack Dickinson, and will hereinafter be referred to as "C.B. DICKINSON."

The Court further finds that on November 19, 1991, C.B. Dickinson and Linda K. Dickinson, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-4146-C. On March 17, 1992, the United States Bankruptcy Court for the Northern

District of Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on April 23, 1992.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Fifty-nine (59), Block Four (4), WEST HIGHLANDS II, an Addition in the County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on August 25, 1988, the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, executed and delivered to Midfirst Mortgage Co., their mortgage note in the amount of $49,201.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, husband and wife, executed and delivered to Midfirst Mortgage Co., a mortgage dated August 25, 1988, covering the above-described property. Said mortgage was recorded on August 30, 1988, in Book 5124, Page 2228, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 25, 1988, Midfirst Mortgage Co., assigned the above-described mortgage note and mortgage to Midfirst Savings and Loan Association. This Assignment of Mortgage was recorded on August 30, 1988, in Book 5124, Page 2233, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, Midfirst Savings and Loan Association, assigned the above-described mortgage note and mortgage to Central Mortgage Corporation. This Assignment of Mortgage was recorded on December 2, 1988, in Book 5143, Page 703, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 10, 1989, Central Mortgage Corporation, assigned the above-described mortgage note and mortgage to Statesman Mortgage Company. This assignment of Mortgage was recorded on October 3, 1989, in Book 5211, Page 577, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 25, 1990, Statesman Mortgage Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This assignment of Mortgage was recorded on August 13, 1990, in Book 5270, Page 1585, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 1, 1990, the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which

default has continued, and that by reason thereof the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, are indebted to the Plaintiff in the principal sum of $72,984.67, plus interest at the rate of Ten percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $30.00 which became a lien on the property as of June 30, 1987; a lien in the amount of $23.00 which became a lien as of June 26, 1992; a lien in the amount of $21.00 which became a lien as of June 25, 1993; and a lien in the amount of $18.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $4,179.95 which became a lien on the property as of April 1, 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, C.B. DICKINSON, LINDA K. DICKINSON, and TULSA ADJUSTMENT BUREAU, INC., disclaim any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, C.B. DICKINSON and LINDA K. DICKINSON, in the principal sum of $72,984.67, plus interest at the rate of Ten percent per annum from May 18, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $30.00, plus penalties and interest, for personal property taxes for the year 1986, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of $4,179.95 for judgment filed on April 1, 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $62.00, plus penalties and interest, for personal property taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, C.B. DICKINSON, LINDA K. DICKINSON, and TULSA ADJUSTMENT BUREAU, INC., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, C.B. DICKINSON and LINDA K. DICKINSON, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the

Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $30.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of $4,179.95, for a judgment.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $62.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

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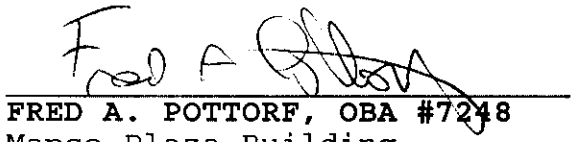

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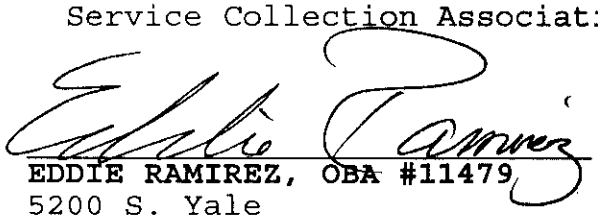

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C.B. Dickinson and
Linda K. Dickinson

Judgment of Foreclosure
Civil Action No. 94-C-652-E
NBK:flv1

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LUTHER GENE BALENTINE;	)	
MARIANNA BALENTINE;	)	
ASSOCIATES FINANCIAL SERVICES CO.	)	
OF OKLAHOMA, INC.	)	
COUNTY TREASURER, Creek County,	)	
Oklahoma;	)	
BOARD OF COUNTY COMMISSIONERS,	)	
Creek County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 94-C-599-E**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of Sept, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, LUTHER GENE BALENTINE and MARIANNA BALENTINE, appear by their attorney, David Anderson; the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, appear not having previously filing a Disclaimer; and the Defendant, ASSOCIATES FINANCIAL SERVICES, CO., OF OKLAHOMA, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LUTHER GENE BALENTINE, signed a Waiver of Summons on June 15, 1994, filed on June 16, 1994; that the Defendant, MARIANNA BALENTINE, signed a Waiver of Summons on June 15, 1994, filed on June 16, 1994; that the

Defendant, ASSOCIATES FINANCIAL SERVICES CO., OF OKLAHOMA, INC., was served a copy of Summons and Complaint on June 15, 1994, by Certified Mail; that Defendant, COUNTY TREASURER, Creek County, Oklahoma, was served a copy of Summons and Complaint on June 14, 1994, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, was served a copy of Summons and Complaint on June 14, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, filed their Disclaimer on July 7, 1994; and that the Defendant, ASSOCIATES FINANCIAL SERVICES CO., OF OKLAHOMA, INC., has failed to answer and its default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT ELEVEN (11), BLOCK TWO (2), COUNTRY AIR ESTATES, A SUBDIVISION LOCATED IN THE W1/2 SE 1/4 IN SECTION 5, TOWNSHIP 18 NORTH, RANGE ELEVEN (11) EAST, CREEK COUNTY, STATE OF OKLAHOMA ACCORDING THE RECORDED PLAT THEREOF.

The Court further finds that on March 3, 1988, R. Ian Pockrus and Elizabeth Pockrus, executed and delivered to First Security Mortgage Company, their mortgage note in the amount of $62,446.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, R. Ian Pockrus and Elizabeth Pockrus, husband and wife, executed and delivered to First Security Mortgage Company, a mortgage dated March 3, 1988, covering the above-described property. Said mortgage was recorded on March 8, 1988, in Book 232, Page 1451-54, in the records of Creek County, Oklahoma.

The Court further finds that on March 8, 1988, First Security Mortgage Company, assigned the above-described mortgage note and mortgage to Liberty Mortgage Company, Inc. This Assignment of Mortgage was recorded on March 21, 1988, in Book 233, Page 176, in the records of Creek County, Oklahoma. This mortgage was re-recorded on March 9, 1988, in Book 232, Page 1529-1532, in the records of Creek County, Oklahoma.

The Court further finds that on May 26, 1988, Liberty Mortgage Company, Inc., assigned the above-described mortgage note and mortgage to The New York Guardian Mortgagee Corp. This Assignment of Mortgage was recorded on August 22, 1988, in Book 238, Page 1853, in the records of Creek County, Oklahoma. This Assignment was re-recorded on January 8, 1993, in Book 301, Page 138, in the records of Creek County, Oklahoma, to show Attestation of Corporate Execution by Secretary.

The Court further finds that on May 26, 1988, The New York Guardian Mortgagee Corporation, assigned the above-described mortgage note and mortgage to Government National Mortgage Association. This Assignment of Mortgage was recorded on December 3, 1991, in Book 284, Page 205, in the records of Creek

County, Oklahoma. This Assignment was re-recorded on March 19, 1992, in Book 288, Page 1173, in the records of Creek County, Oklahoma, to show proper chain of title, and re-recorded again on January 8, 1993, in Book 301, Page 139, in the records of Creek County, Oklahoma.

The Court further finds that on October 23, 1991, Government National Mortgage Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on December 3, 1991, in Book 284, Page 306-307, in the records of Creek County, Oklahoma. This Assignment was re-recorded on January 8, 1993, in Book 301, Page 140-141, in the records of Creek County, Oklahoma, to correct the legal description; and re-recorded again on February 26, 1993, in Book 303, Page 560-561, in the records of Creek County, Oklahoma, to show the recording of the Mortgage.

The Court further finds that on May 25, 1990, R. Ian Pockrus, a single person, and Elizabeth Ann Pockrus, aka Elizabeth Pockrus, a single person, granted a general warranty deed to Luther Gene Balentine and Marianna Balentine, husband and wife. This deed was recorded with the Creek County Clerk on May 29, 1990, in Book 263, at Page 1770 and Luther Gene Balentine and Marianna Balentine, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on October 1, 1991, the Defendants, LUTHER GENE BALENTINE and MARIANNA BALENTINE, husband and wife, entered into an agreement with the Plaintiff lowering

the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on March 1, 1992, June 1, 1992, and January 1, 1993.

The Court further finds that the Defendants, LUTHER GENE BALENTINE and MARIANNA BALENTINE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, LUTHER GENE BALENTINE and MARIANNA BALENTINE, are indebted to the Plaintiff in the principal sum of $79,250.73, plus interest at the rate of Ten percent per annum from May 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, ASSOCIATES FINANCIAL SERVICES CO., OF OKLAHOMA, INC., is in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, LUTHER GENE BALENTINE and MARIANNA BALENTINE, in the principal sum of $79,250.73, plus interest at the rate of Ten percent per annum from May 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, ASSOCIATES FINANCIAL SERVICES CO., OF OKLAHOMA, INC., have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, LUTHER GENE BALENTINE and MARIANNA BALENTINE, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

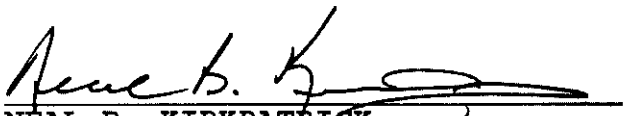
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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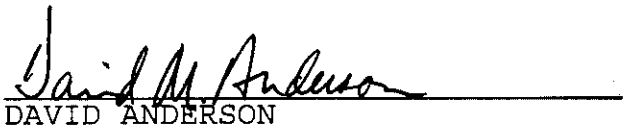

DAVID ANDERSON
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(918) 742-7115
Attorney for Defendants,
Luther Gene Balentine
and Marianna Balentine

Judgment of Foreclosure
Civil Action No. 94-C-599-E

NBK:flv

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY E. NEWELL,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

93-C-0530-E

ORDER

The Secretary of Health and Human Services denied Social Security disability benefits to Plaintiff Mary Newell. The Secretary concluded that Ms. Newell could return to work. Ms. Newell now appeals that decision, raising three issues: (1) Whether the Administrative Law Judge ("ALJ") violated the "treating physician" rule; (2) Whether the ALJ properly evaluated her credibility and complaints of pain; and (3) Whether substantial evidence supports the Secretary's decision to deny disability benefits.[1] Upon review, the court remands the case for reconsideration of the evidence submitted by the "treating physician."

I. Legal Analysis

Ms. Newell, 57 years old at the time of the hearing, has a Master's Degree in Education. She has taught for 34 years, including her last year as an art teacher. On April

[1] *In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

19

9, 1991, Ms. Newell applied for disability benefits, alleging disability since March 22, 1991 due to chest pain and pressure caused by coronary spasm.

The Secretary denied her application initially and on reconsideration. The ALJ then, in a May 18, 1992 decision, found that Ms. Newell was not disabled. Although the ALJ concluded that Ms. Newell could not return to her past work as a teacher, he found that she could perform a full range of sedentary work. Specifically, the ALJ found that Ms. Newell could work as a teacher's aide, interviewing clerk, receptionist and office clerk.

When deciding a claim for benefits under the Social Security Act, the ALJ must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In the case at bar, the ALJ, found at step 5, that Ms. Newell could working in the aforementioned jobs.

Ms. Newell now challenges those findings. She raises two legal issues: (1) Whether the ALJ followed the treating physician rule and (2) Whether the ALJ properly evaluated her testimony and subjective complaints. See, *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985)("Grounds for reversal exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed.")

In addition, Ms. Newell argues that substantial evidence does not support the ALJ's decision.[2] Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987).[3] A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

A. Treating Physician

The first issue is worded by Ms. Newell as follows: "The decision improperly concludes that Plaintiff's treating physician does not believe that she is totally disabled and that she is capable of other work." While that statement is unclear, she appears to argue that the ALJ (1) did not properly interpret the findings of Dr. Robert Okada, a treating physician and (2) did not give sufficient weight to the evidence submitted by Dr. Okada.

The cogent question now raised is why the ALJ did not give more weight to the opinions of Dr. Robert Okada, an M.D., Ms. Newell's treating physician? Two items of evidence from Dr. Okada support Ms. Newell's disability claim: (1) a March 8, 1991 Attending Physicians Statement. *Record at 147* and (2) a July 23, 1991 letter from Dr. Okada.

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[2] *The question is whether Ms. Newell was disabled under the Social Security Act between March 22, 1991, the onset date, and May 18, 1992, the date of the ALJ's denial decision.*

[3] *One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record.* Social Security Law and Practice, *§37.1 (1993).*

The Statement, which is a form for an insurance company, indicates that Dr. Okada found that Ms. Newell had (1) a marked limitation in her "functional capacity"; (2) a severe limitation of functional capacity and incapable of minimum (sedentary) activity; and (3) that she was unable to engage in stress situations or engage in interpersonal relations(marked limitations). Dr. Okada also found that Ms. Newell could not return to work of any kind, indicating that he did not expect a marked change in the future. One question that Dr. Okada did not answer was whether Ms. Newell was disabled from performing all types of work.

A second item of evidence is a July 23, 1991 letter by Dr. Okada. It read: "Our current feeling is that her chest pains are secondary to coronary artery spasm. She has responded well to antispasm medication; however, stressful situations will tend to exacerbate the problem. She has been much improved since retiring from teaching. Therefore, at this time, I would consider her disabled and would fully support her application for Social Security disability." *Record at 146.*[4]

The only other medical evidence of any substance is a June 17, 1991 examination by Dr. J. Michael Ritze, a "consulting" physician for the Secretary. While he made no specific finding as to whether Ms. Newell could continue to work, Dr. Ritze's impression was she could. He said she had "chest pain with coronary artery spasms by history." *Id. at 216.* Non-medical evidence included the testimony of Ms. Newell and that of the vocational expert.

[4] *A March 23, 1992 letter from Dr. Okada to Ms. Newell's attorney (Mr. Timothy White) also appears in the Record at page 222.*

The "treating physician" rule states that "unless good cause is shown to the contrary, the Secretary must give substantial weight to the testimony of the claimant's treating physician. *Byron v. Heckler,* 742 F.2d 1232, 1235 (10th Cir. 1984). If substantial weight is not given to such testimony, specific, legitimate reasons for this action must be set forth. *Jozefowicz v. Heckler*, 811 F.2d 1352 (10th Cir.1987).

In this case, the ALJ gave specific reasons for discounting the evidence submitted by Dr. Okada. He correctly noted that some of Dr. Okada's statements were inconsistent with his finding of disability. For example, at one point, Dr. Okada wrote that "since she [Ms. Newell] is doing so well at this time, I have not scheduled her for a return office visit." In addition, the ALJ pointed out that inconsistencies existed on the Attending Physicians Statement filled out by Dr. Okada (which indeed appears to be the case.) Furthermore, the ALJ noted that, on the Physicians Statement, Dr. Okada did not answer whether Ms. Newell could return to work other than her previous job. Furthermore, the ALJ properly noted that Dr. Okada was not a vocational expert.

The reasons given by the ALJ are "specific", but are they legitimate? One of the chief reasons used by the ALJ in discounting Dr. Okada's opinion was the failure to answer the question about whether she could work at any job (on the Physicians Statement). The ALJ interpreted this omission to be supportive of his decision. *Record at 30 ("It is clear...that Dr. [Okada] does not believe that claimant is totally disabled from all work").* That interpretation, however, was incorrect for two reasons. First, since Dr. Okada did not check "yes" or "no" on the question, it carries no evidentiary value. Second, in a February 11, 1993 letter, Dr. Okada said not checking the box "was an oversight on my part." Dr.

Okada also noted that he fully intended to check the box marked "yes" to indicate that the patient is totally disabled from any other work. Dr. Okada also wrote that, in his opinion, Ms. Newell had been "totally disabled from all work" since March 22, 1991. *Record at 14.*

The circumstances here justify a remand. On one hand, several reasons cited by the ALJ for discounting Dr. Okada's opinion are arguably legitimate. *See, Edwards v. Sullivan*, 937 F.2d 580, 583 (11th Cir. 1991)("The treating physician's report may be discounted wnen it is not accompanied by objective medical evidence or is wholly conclusory.") On the other hand, Dr. Okada's February 11, 1993 letter makes it clear that Dr. Okada found Ms. Newell to be disabled from all work -- something the ALJ did not take into consideration. Had the ALJ knew that Dr. Okada fully supported Ms. Newell's disability claim, it may have changed the result of his decision. As a result, a review of the disability determination hinges, to a great extent, on how the ALJ "weighs" Dr. Okada's opinion in light of the February 11, 1993 letter and subsequent testimony.[5]

On remand, the ALJ must conduct a supplemental hearing where Dr. Robert Okada testifies. In addition, the Secretary may have a "medical expert" testify at the hearing. After the new evidence is reviewed, the ALJ should again weigh all of the evidence and make his disability determination. This Order does not make a finding of whether Ms. Newell is disabled. That decision is left to the judgment of the ALJ in light of this opinion

[5] *One reason for the remand is that the ALJ did not have the February 11, 1993 letter in front of him prior to making his decision. Had he had the letter, perhaps his decision would have been different. A remand also seems logical since the evidence submitted by Dr. Okada (and the weight given to it by the ALJ) is the controlling factor in the disability determination. While the vocational expert's testimony supports a finding of no disability, the other significant evidence (i.e. Ms. Newman's testimony and Dr. Ritze's examination) boils down to the judgment of the fact-finder and arguably could support either party.*

and subsequent testimony.[6] The case is REMANDED.

SO ORDERED THIS 26th day of September, 1994.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

[6] *The ALJ, however, is reminded that the "treating physician" rule must be followed. Second, as the ALJ noted in his opinion, the analysis is at Step 5 -- meaning the Secretary has the burden to prove that Ms. Newman can return to work. The Court, however, finds that the remaining issues of Ms. Newman are without merit (i.e. evaluation of her subjective complaints, credibility of her testimony).*

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 26 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CLEM C. RIFE)
Plaintiff,)
)
-versus-) No. 94-C-872-B
)
LIFE INSURANCE COMPANY)
OF NORTH AMERICA, INC., a corporation)
Defendant.)

DATE SEP 27 1994

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

ORDER PERMITTING AMENDMENT OF COMPLAINT AND DISMISSAL

On this 26th day of September, 1994 the Court has for consideration the Plaintiff's Application to File Amended Complaint in which the Plaintiff stipulates that Connecticut General Life Insurance Company should be dismissed as a Defendant in this proceeding and Life Insurance Company of North America substituted as the party defendant; and, having considered the same, the Court finds that Connecticut General Life Insurance Company should be dismissed as party Defendant.

It is therefore ordered that the above styled action be dismissed as to Connecticut General Life Insurance Company.

It is further ordered that the Plaintiff be and he is hereby given permission to amend his complaint to substitute as a Defendant in this action Life Insurance Company of North America.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNA PROTHRO,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-410-B

ORDER

Before the Court for consideration is Plaintiff Donna Prothro's appeal (Docket #1), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits. Plaintiff, who suffers from arthritis, applied for Social Security Disability benefits on September 30, 1991. Her appeal was denied by the Secretary on March 31, 1993. Plaintiff now seeks judicial review.

Plaintiff asserts the following grounds for reversing the ALJ's denial of benefits:

> 1. The Plaintiff could not perform her past work;
>
> 2. The ALJ did not properly evaluate the Plaintiff's credibility and complaints of pain;
>
> 3. The ALJ applied improper legal standards when he assesses a mental impairment; and
>
> 4. The Plaintiff cannot perform her past work and the medical vocational guidelines would direct a finding of disabled.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423 (d)(1)(A). An individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521

(10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app.

1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920. In this case, the ALJ entered a decision at the fourth level of the sequence, determining that Plaintiff could perform her past relevant work as a security guard.

The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff argues that the ALJ did not properly evaluate her credibility and complaints of pain. "Subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v.

Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Also, Plaintiff's subjective statements cannot take precedence over conflicting objective evidence. Williams, 844 F.2d at 755.

In the ALJ's findings, he determines that Plaintiff has severe arthritis of the lumber and cervical spine (Tr. 16). However, the ALJ apparently entirely disregarded Plaintiff's testimony and the medical record regarding Plaintiff's plantar spur. He found Plaintiff's subjective allegations of disabling pain to not be credible.[1] Id. He acknowledged that Plaintiff has a heel spur, but did not consider it when determining that Plaintiff could perform her past relevant work as a security manager. The ALJ stated:

> It is true that she has a heel spur. However, it is well known that an individual can get up and walk on a heel spur, and the pain will go away after a short period of time. A heel spur is not totally disabling ....

(Tr. 14).

The ALJ cites no evidence for this proposition. There is some medical evidence in the record that states the heel spur causes her "moderate discomfort" (Tr. 113). Plaintiff was advised to avoid putting excessive weight on the left foot and to avoid excessive walking. Id. Whether the heel spur rises to the level of disabling is not for this Court to determine. However, there is enough evidence in the record to indicate that the heel spur should at least be considered, and not summarily dismissed, when evaluating

---

[1]Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence.

Plaintiff's condition.

Plaintiff also argues that the ALJ applied improper legal standards when he assesses a mental impairment. Plaintiff argues that, because the ALJ found Plaintiff to be histrionic, he failed to do a required mental evaluation for hypochondriasis. The Court disagrees. The ALJ was merely evaluating Plaintiff's credibility as a witness, not diagnosing Plaintiff as having a severe, medically determinable mental impairment. Therefore, a mental evaluation for hypochondriasis was not required.

Plaintiff also argues that she cannot perform her past work and the medical vocational guidelines would direct a finding of disabled. However, the ALJ did not proceed to the fifth step of the inquiry. This Court, with no vocational testimony in the record, has no authority to make such a determination *de novo*. If the ALJ, upon remand, determines that Plaintiff is unable to perform her previous relevant work, he will proceed to the fifth step and make such determination.

The Court finds that the ALJ should have considered the evidence regarding Plaintiff's heel spur in determining whether she is able to perform her past relevant work. Therefore, the Court hereby REMANDS this case to the Secretary for further consideration.

IT IS SO ORDERED THIS 26TH DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY FRANCES D. WILLIAMS aka MARY WILLIAMS aka MARY FRANCES DEANA PANTHER-WILLIAMS; FRED WILLIAMS; TULSA ADJUSTMENT BUREAU, INC.; STATE OF OKLAHOMA, ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

SEP 26 1994

ENTERED ON DOCKET

DATE

CIVIL ACTION NO. 94-C 537B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26 day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, **Tulsa Adjustment Bureau, Inc.**, appears not having previously filed its disclaimer; and the Defendants, **Mary Frances D. Williams aka Mary Williams aka Mary Frances Deana Panther-Williams**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Mary Frances D. Williams aka**

Mary Williams aka Mary Frances Deana Panther-Williams, will hereinafter be referred to as ("Mary Frances D. Williams"). The Defendants, Mary Frances D. Williams and Fred Williams were granted a divorce in Tulsa County District Court, case number FD 93-06109, dated September 21, 1993, and filed on September 28, 1993 in the records of Tulsa County, Oklahoma; and Mary Frances D. Williams is a single person.

The Court being fully advised and having examined the court file finds that the Defendant, Mary Frances D. Williams, was served with process on July 13, 1994; the Defendant, Fred Williams, was served with process on July 25, 1994; the Defendant, Tulsa Adjustment Bureau, Inc., waived service of Summons on June 1, 1994, which was filed on June 7, 1994; and that the Defendant, State of Oklahoma ex rel State of Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on May 26, 1994.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on June 9, 1994; that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, filed its Answer on June 21, 1994 and filed its Amended Answer on June 30, 1994; the Defendant, Tulsa Adjustment Bureau, Inc., filed its Disclaimer on June 7, 1994; and that the Defendants, Mary Frances D. Williams and Fred Williams, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property

located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **LOT TWENTY-SIX (26), BLOCK NINE (9), SMITHDALE, AN ADDITION IN TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.**
>
> **A/K/A 2454 NORTH WINSTON, TULSA, OK 74115**

The Court further finds that on October 14, 1986, Jimmie Lee Coleman and Ladonna Eugena Coleman, executed and delivered to FIRSTIER MORTGAGE CO., THEIR mortgage note in the amount of $30,100.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Jimmie Lee Coleman and Ladonna Eugena Coleman, husband and wife, executed and delivered to FIRSTIER MORTGAGE CO., a mortgage dated October 14, 1986, covering the above-described property. Said mortgage was recorded on October 17, 1986, in Book 4976, Page 2962, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirsTier Mortgage Co. (formerly known as Realbanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on September 29, 1988, in Book 5129, Page 174, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 21, 1990, LEADER FEDERAL BANK FOR SAVING assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 451 SEVENTH STREET, SW, WASHINGTON, DC 20410, his successors in office

and assigns. This Assignment of Mortgage was recorded on April 9, 1990, in Book 5246, Page 359, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Mary Frances D. Williams and Fred Williams, then husband and wife, were the record title holders by virtue of a General Warranty Deed dated June 1, 1989, and recorded on June 6, 1989 in Book 5187, Page 1082, in the record of Tulsa County, Oklahoma. A corrected General Warranty Deed, dated November 8, 1991, was filed on November 13, 1991, in Book 5361, Page 1749, in the records of Tulsa County, Oklahoma. The Defendants, Mary Frances D. Williams and Fred Williams, are the current assumptors of the subject indebtedness.

The Court further finds that on November 16, 1990, the Defendants, Mary Frances D. Williams and Fred Williams, filed their Chapter 7 petition in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 90-3573-C, which was discharged on March 11, 1991, and closed on May 7, 1991.

The Court further finds that on February 1, 1990, the Defendants, Mary Frances D. Williams and Fred Williams, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on November 1, 1990, May 1, 1991, November 1, 1991, May 1, 1992.

The Court further finds that the Defendants, Mary Frances D Williams Fred Williams, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the

monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Mary Frances D. Williams and Fred Williams**, are indebted to the Plaintiff in the principal sum of $44,130.60, plus interest at the rate of 10.5 percent per annum from May 13, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $9.00 which became a lien on the property as of June 25, 1993; and a claim against the subject property in the amount of $9.00 for the tax year 1993. Said lien and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of tax lien number STS0005741500 in the amount of $21,311.91, filed on October 31, 1983; lien number STS005432200 in the amount of $24,661.28 filed on October 31, 1983; lien number STS0005440800 in the amount of $16,349.40 filed on January 4, 1984; and lien number STS0005481500 in the amount of $38,146.34 filed on December 4, 1984; plus interest, penalties, and costs. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Mary Frances D. Williams and Fred Williams**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Tulsa Adjustment Bureau, Inc.**, disclaims any right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Mary Frances D. Williams and Fred Williams**, in the principal sum of $44,130.60, plus interest at the rate of 10.5 percent per annum from May 13, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action in the amount, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $18.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem **in the** amount of $100,468.93, plus accrued and accruing interest, **for** state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Mary Frances D. Williams, Fred Williams, Tulsa Adjustment Bureau, Inc. and Board of** County **Commissioners, Tulsa County, Oklahoma**, have no **right, title**, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Mary Frances D. Williams and Fred Williams**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be **issued to** the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's **election** with or without appraisement the real property involved **herein** and apply the proceeds of the sale as follows:

First:

In payment of the **costs of** this action accrued and accruing **incurred** by the Plaintiff, including the **costs of** sale of said real property;

Second:

In payment of the **judgment** rendered herein in favor of the **Plaintiff**;

Third:

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS

UNITED STATES DISTRICT JUDGE

APPROVED:

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United States Attorney

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Judgment of Foreclosure
Civil Action No. 94-C 537B

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1994

U.S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff, vs. MARION O. ROSS, JR.; PATRICIA A. ROSS; JESSE JOYNER; WILLIE MAE JOYNER; STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION; SERVICE COLLECTION ASSOCIATION, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	ENTERED DATE CIVIL ACTION NO. 94-C 466B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26 day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, **Service Collection Association, Inc.**, appears not, having previously filed its disclaimer; and the Defendants, **Marion O. Ross, Jr., Patricia A. Ross, Jesse Joyner and Willie Mae Joyner**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Jesse Joyner and Willie Mae Joyner**, waived service of Summons on May 16, 1994, which was filed on May 17, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via Certified Mail on May 12, 1994; and that the Defendant, **Service Collection Association, Inc.**, waived service of Summons, which was filed on May 17, 1994.

The Court further finds that the Defendants, **Marion O. Ross, Jr. and Patricia A. Ross**, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 28, 1994, and continuing through August 2, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Marion O. Ross, Jr. and Patricia A. Ross**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Marion O. Ross, Jr. and Patricia A. Ross**. The Court conducted an inquiry into the

sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 23, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on May 27, 1994; that the Defendant, **Service Collection Association, Inc.,** filed its Disclaimer on May 26, 1994; and that the Defendants, **Marion O. Ross, Jr., Patricia A. Ross, Jesse Joyner, and Willie Mae Joyner**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real

property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> LOT SIXTEEN (16), BLOCK ONE (1), SUMMERFIELD SOUTH, AN ADDITION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT, LESS AND EXCEPT A DRIVEWAY EASEMENT MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTHWEST CORNER OF SAID LOT SIXTEEN (16), WHICH IS ALSO THE SOUTHWEST CORNER OF LOT SEVENTEEN (17), BLOCK ONE (1), SAID SUMMERFIELD SOUTH; THENCE SOUTHWESTERLY ALONG THE WESTERLY BOUNDARY OF SAID LOT SIXTEEN (16), SIX (6.00) FEET; THENCE EASTERLY TO A POINT IN THE NORTHERN BOUNDARY OF SAID LOT SIXTEEN (16), TEN (10.00) FEET TO THE POINT OF BEGINNING, THIRTY (30.00) SQUARE FEET, MORE OR LESS.

The Court further finds that on August 31, 1988, the Defendants, Marion O. Ross, Jr. and Patricia A. Ross, executed and delivered to OAK TREE MORTGAGE CORPORATION their mortgage note in the amount of $69,805.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Marion O. Ross, Jr. and Patricia A. Ross, husband and wife, executed and delivered to OAK TREE MORTGAGE CORPORATION a mortgage dated August 31, 1988, covering the above-described property. Said mortgage was recorded on October 27, 1988, in Book 5136, Page 1978, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 7, 1989, Oak Tree Mortgage Corporation f/k/a United Bankers Mortgage Corporation assigned the above-described mortgage note and mortgage to the United States Secretary of Housing and Urban

Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 12, 1989, in Book 5206, Page 2246, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 30, 1989, the Defendants, Marion O. Ross, Jr. and Patricia A. Ross, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Marion O. Ross and Patricia A. Ross, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Marion O. Ross and Patricia A. Ross**, are indebted to the Plaintiff in the principal sum of $104,022.46, plus interest at the rate of 8.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $56.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $49.00 which became a lien on June 25, 1993; and a claim against the subject property in the amount of $56.00 for the tax year 1993.

Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of tax warrant number ITI9000160000, in the amount of $466.92, plus interest, penalties, and costs, which was filed on March 21, 1990. Said lien is inferior to the interest of the Plaintiff, Untied States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Marion O. Ross, Jr., Patricia A. Ross, Jesse Joyner, and Willie Mae Joyner**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Service Collection Association, Inc.**, disclaims any right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover

judgment in rem against the Defendants, **Marion O. Ross, Jr. and Patricia A. Ross**, in the principal sum of $104,022.46, plus interest at the rate of 8.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $161.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of $466.92, plus penalties and interest, for state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Marion O. Ross, Jr., Patricia A. Ross, Jesse Joyner, Willie Mae Joyner, Service Collection Association, Inc. and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Marion O. Ross Jr. and Patricia A. Ross**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise

and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of $466.92, plus accrued and accruing interest, for state taxes.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $161.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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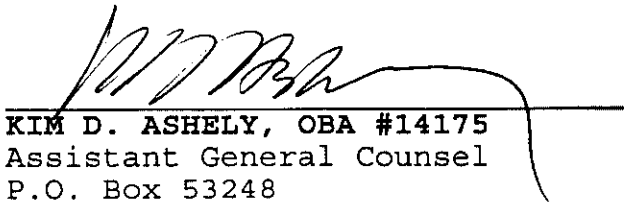

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Judgment of Foreclosure
Civil Action No. 94-C 466B

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES L. POTTER aka JAMES LEONARD POTTER; KIM EILEEN POTTER; CHARLES W. POTTER; THE RIVERHOUSE BOARD OF ADMINISTRATORS aka RIVERHOUSE CONDOMINIUM ASSOCIATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

SEP 26 1994

U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE

CIVIL ACTION NO. 94-C 461B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26 day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **the Riverhouse Board of Administrators aka Riverhouse Condominium Association**, appears by its Representative, Laurie Fiocchi; and the Defendants, **James L. Potter aka James Leonard Potter, Kim Eileen Potter, and Charles W. Potter**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **James L. Potter aka James Leonard Potter**, will hereinafter be referred to as ("James L.

Potter"); and that the Defendants, James L. Potter and Kim Eileen Potter, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, James L. Potter, waived service of Summons on May 23, 1994, which was filed on May 25, 1994; the Defendant, Kim Eileen Potter, waived service of Summons on May 21, 1994, which was filed on May 25, 1994; the Defendant, Charles W. Potter, waived service of Summons on June 28, 1994, which was filed on June 30, 1994; that the Defendant, Riverhouse Board of Administrators aka Riverhouse Condominium Association through Dr. Robert E. Baker, waived service of Summons and Complaint on May 23, 1994, which was filed on June 1, 1994, and the same Defendant, through Laurie Fiocchi, Waived service of Summons on May 27, 1994, which was filed June 1, 1994.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answer on May 23, 1994; that the Defendant, The Riverhouse Board of Administrators aka Riverhouse condominium Association, filed its Answer on June 28, 1994; and that the Defendants, James L. Potter, Kim Eileen Potter, and Charles W. Potter, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

UNIT "A", THE RIVERHOUSE, a Condominium created under a Declaration of Unit Ownership Estates, filed in Book 4422 at Pages 980 thru 1037, inclusive and located on the following described property:

The East 80 feet of Lot Ten (10) in AARONSON'S RESUBDIVISION OF BLOCK SEVEN (7), BUENA VISTA PARK ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 18, 1987, Daniel P. Schuman and Vida K. Schuman, executed and delivered to FIRST SECURITY MORTGAGE COMPANY their mortgage note in the amount of $41,800.00, payable in monthly installments, with interest thereon at the rate of nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, Daniel P. Schuman and Vida K. Schuman, Husband and Wife, executed and delivered to FIRST SECURITY MORTGAGE COMPANY a mortgage dated March 18, 1987, covering the above-described property. Said mortgage was recorded on April 1, 1987, in Book 5012, Page 240, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, First Security Mortgage Company assigned the above-described mortgage note and mortgage to Bank of Oklahoma, N.A.. This Assignment of Mortgage was recorded on March 14, 1989, in Book 5171, Page 1498, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1989, Bank of Oklahoma, National Association assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN

DEVELOPMENT, HIS SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on March 14, 1989, in Book 5171, Page 1499, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, James L. Potter, currently holds the record title to the property by virtue of a General Warranty Deed dated July 11, 1988, and recorded on July 12, 1988 in Book 5113, Page 1623, in the records of Tulsa County, Oklahoma; and the Defendant, James L. Potter, is the current assumptor of the subject indebtedness.

The Court further finds that on March 1, 1989, the Defendant, James L. Potter, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1990.

The Court further finds that on April 18, 1991, the personal liability of the Defendants, James L. Potter and Kim Eileen Potter, on the debt represented by the subject note and mortgage was discharged in the United States Bankruptcy Court for the District of Kansas, Case Number 90-22076-7, a Chapter 7 bankruptcy instituted on November 30, 1990, and closed on April 18, 1991.

The Court further finds that on February 25, 1992, a probate action was instituted in Tulsa County District Court, under case number P-92-170, styled In The Matter of the Estate of James L. Potter, deceased; the verified petition for letters of administration filed therein stated that the decedent, James L.

Potter, died on May 7, 1989; Letters of Administration were granted on February 25, 1992, to Darlene Virginia Potter; the decedent herein cannot be the same individual as the James L. Potter who is named as a defendant in this action because the deceased James L. Potter died prior to filing for bankruptcy relief as set out herein; further, the last will and testament filed in said probate action lists the decedent's middle name as "Leroy" and the defendant James L. Potter's middle name is "Leonard"; therefore, the defendant, James L. Potter, is not the same person as the decedent in this probate.

The Court further finds that the Defendant, James L. Potter, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, James L. Potter, is indebted to the Plaintiff in the principal sum of $65,388.38, plus interest at the rate of 9 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a claim against the property which is the subject matter of this action by virtue of personal property taxes in the amount of $22.00 for the tax year 1993. Said claim is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **The Riverhouse Board of Administrators aka Riverhouse Condominium Association,** has a lien against the property which is the subject matter of this action by virtue of outstanding balance owed for unpaid common expenses, special assessments, attorneys fee, and interest in the amount of $7,455.97. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **James L. Potter, Kim Eileen Potter, and Charles W. Potter**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **James L. Potter**, in the principal sum of $65,388.38, plus interest at the rate of 9 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any

additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $22.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **The Riverhouse Board of Administrators aka Riverhouse condominium Association**, have and recover judgment in the amount of $7,455.97, plus penalties and interest, for outstanding unpaid common expenses, special assessments, attorneys fees, and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **James L. Potter, Kim Eileen Potter, Charles W. Potter, and the Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **James L. Potter**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, The Riverhouse Board of Administrators aka Riverhouse Condominium Association, in the amount of $7,455.97, outstanding unpaid common expenses, special assessments, attorneys fees, and interest.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $22.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

/s/ Neil Pinnell

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Representative of Defendant,
The Riverhouse Board of
Administrators aka Riverhouse
Condominium Association.

Judgment of Foreclosure
Civil Action No. 94-C 461B

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH J. POOLE; RUTH LAVERNE POOLE; PERFECT INVESTMENTS, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	ENTERED DATE SEP 27 1994 CIVIL ACTION NO. 94-C 383B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26th day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **Perfect Investment, Inc.**, appears not, having previously filed its Disclaimer; and the Defendants, **Joseph J. Poole and Ruth Laverne Poole**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Perfect Investments, Inc.**, acknowledged receipt of Summons and Complaint on April 18, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 18, 1994; and that Defendant, **Board of County Commissioners, Tulsa County,**

Oklahoma, acknowledged receipt of Summons and Complaint on April 18, 1994.

The Court further finds that the Defendants, **Joseph J. Poole and Ruth Laverne Poole**, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 8, 1994, and continuing through August 12, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Joseph J. Poole and Ruth Laverne Poole**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Joseph J. Poole and Ruth Laverne Poole**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma,

through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 9, 1994; that the Defendant, **Perfect Investments, Inc.**, filed its Disclaimer on May 17, 1994; and that the Defendants, **Joseph J. Poole and Ruth Laverne Poole**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Thirteen (13), Block Two (2), SUBURBAN ACRES FOURTH ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on November 18, 1986, the Defendants, Joseph J. Poole and Ruth Laverne Poole, executed and delivered to FIRST SECURITY MORTGAGE COMPANY their mortgage note in the amount of $34,182.00, payable in monthly installments,

with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Joseph J. Poole and Ruth Laverne Poole, Husband and Wife, executed and delivered to First Security Mortgage Company a mortgage dated November 18, 1986, covering the above-described property. Said mortgage was recorded on November 21, 1986, in Book 4984, Page 1021, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 23, 1987, FIRST SECURITY MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on April 2, 1987, in Book 5012, Page 1563, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 27, 1988, Mortgage Clearing Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on October 17, 1988, in Book 5134, Page 1682, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1988, the Defendant, Joseph J. Poole, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Joseph J. Poole and Ruth Laverne Poole, made default under the terms of the

aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Joseph J. Poole and Ruth Laverne Poole**, are indebted to the Plaintiff in the principal sum of $55,818.63, plus interest at the rate of 9.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $3.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $2.00 which became a lien as of June 25, 1993 ; and a lien in the amount of $2.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds that the Defendants, **Joseph J. Poole and Ruth Laverne Poole**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Perfect Investments, Inc.**, disclaims any right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Joseph J. Poole and Ruth Laverne Poole**, in the principal sum of $55,818.63, plus interest at the rate of 9.5 percent per annum from April 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $7.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Joseph J. Poole, Ruth Laverne Poole, Perfect Investments, Inc. and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Joseph J. Poole and Ruth Laverne Poole**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $7.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ [illegible]

UNITED STATES DISTRICT JUDGE

APPROVED:
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County Treasurer and
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Judgment of Foreclosure
Civil Action No. 94-C 383B
NBK:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VERL O. RUPE,

Plaintiff,

vs.

DONNA E. SHALALA, Secretary of Health and Human Services,

Defendant.

Case No. 93-C-524-B

ORDER

This matter comes on for consideration of Plaintiff's Complaint seeking judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying Plaintiff's application for disability insurance benefits under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq*.

Verl O. Rupe, (Plaintiff or claimant) filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on September 5, 1991, with a protective filing date of August 13, 1991. Plaintiff's application was denied initially, and again upon reconsideration. After an administrative hearing held on July 6, 1992, the Administrative Law Judge (ALJ) issued a denial Decision on January 25, 1993. The Appeals Council denied the Plaintiff's request for review on April 22, 1993, and after reviewing additional evidence found on June 3, 1993 no basis for vacating its previous action.

The Plaintiff filed this action on June 7, 1993, pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative

decision to deny benefits under §§216(i) and 223 of the Social Security Act. Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir.1978).

Plaintiff sets forth five grounds for reversing the ALJ's denial of benefits:

1) The ALJ erroneously rejected the opinions of medical experts.

2) The ALJ did not correctly consider the Plaintiff's non-exertional impairments.

3) The ALJ did not call a Vocational Expert witness.

4) The ALJ incorrectly determined Plaintiff's residual functional capacity.

5) The ALJ incorrectly applied the "grids" in the presence of severe non-exertional impairments.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id.

§423(d)(1)(A). An individual

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. *See,* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987); Talbot v. Heckler, 814 F2d 1456 (10th Cir.1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir.1983); and Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988). The five steps, as set forth in the authorities above cited, proceed as follows:

(1) Is the claimant currently working? A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) If claimant is not working, does the claimant have a severe impairment? A person who does not have an impairment or combination of impairments severe enough to limit his or her ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) If the claimant has a severe impairment, does it meet or equal an impairment listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1. A person whose impairment meets or equals one of the impairments listed therein is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) Does the impairment prevent the claimant from

doing past relevant work? A person who is able to perform work he or she has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) Does claimant's impairment prevent him or her from doing any other relevant work available in the national economy? A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, at 243; Talbot v. Heckler, at 1460; 20 C.F.R. § 416.920.

The ALJ followed the five-step approach set forth above and concluded (Tr. 52-66):

1) That claimant has not engaged in any substantial gainful activity since the alleged onset date (June 3, 1990).

2) "[T]hat the claimant has severe impairments as defined in section 404.1521 of the Social Security Regulations, that is, impairments which significantly affect the performance of basic work activities."

3) That "[H]owever, the record does not show that the claimant has an impairment or combination of impairments which meets or equals the severity of any impairment listed in Appendix 1 to Subpart P of Regulations No.4".

4) That "claimant cannot perform his past relevant work as mail carrier, department/manager, merchandiser for retail store, or carpenter and roofer" since these jobs are characterized in his vocational report as requiring lifting up to 50 or 100 pounds" but, in spite of severe impairments, retains the residual functional capacity to perform the full range of sedentary work and a wide range of light work.

5) That, being "authorized to refer to Appendix 2 to determine if there are a significant number of jobs that the claimant could perform," a sufficient number ofjobs exist in significant numbers in the national economy which claimant

could perform and that therefore claimant "is not disabled within the meaning and intent of the Social Security Act, as amended, under section 404.1520(f) of the Regulations at anytime through the date of this decision."

Specifically the ALJ found that the medical evidence established "that the claimant has severe apparent chronic myofascitis/fibromyalgia, status post bilateral carpal tunnel release (June 1990 and November 1990), and/or somatic disorder/dysthymia/generalized anxiety disorder, but that he does not have an impairment or combination of impairments . . ." sufficient to demonstrate a disability as defined by the Regulations and the Social Security Act. (Tr. at 64) Additionally, the ALJ found that "[T]he degree of functional limitation the claimant alleges due to pain and other subjective complaints is not credible based on the reasons set forth herein." (Tr. at 64).

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, at 1521; Brown, at 362.

The Plaintiff has the burden to show that he is unable to return to the prior work he performed, Bernal, at 299, a burden the Plaintiff carried. Further, the Plaintiff has the burden of proving his disability prevents him from engaging in any gainful work activity, Channel v. Heckler, 747 F.2d 577 (10th Cir.1984), a

burden Plaintiff did not sustain.

This is essentially a "pain" case. Plaintiff's primary argument is that the ALJ did not properly evaluate his claim that the pain he was suffering was disabling. The ALJ found that Plaintiff's testimony as to pain was not credible and that his pain was not disabling sufficient to satisfy the Regulations.

The Tenth Circuit has held that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

The ALJ considered the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and concluded Plaintiff's pain was not disabling. The ALJ stated that the objective medical evidence showed no underlying impairment so severe as to preclude light and sedentary work (TR at 62). In addition, the ALJ noted that claimant's home activities included vacuuming, working in his garden several times weekly and other routine activities and occasionally extra-ordinary exertions such as trimming his dog, mowing the law, picking peaches and doing some overhead work at home which "if the claimant's limitations were as great as he alleges, he should have not been able even to attempt, much less do". (Tr. at 60) Such activities, the ALJ concluded, are inconsistent with a claim of incapacitating pain.

Further, the ALJ was of the view that Plaintiff's pain

complaints were "too self-serving to be believable"; that "claimant's hand written "journal" of several days at the end of June, beginning of July 1992, is worthless as a record of actual events. It was clearly all written at the same time, and therefore, is merely a record of his usual recitation. He clearly did not take notes at the time of his falling asleep and wakening, there would be no way for him to remember the exact times several days later." The ALJ opined that Plaintiff's "daily activities still include a wide range of normal activities, interrupted by his protestations of extreme pain"; that "because of the evidence of exaggeration and volitional embellishment of symptoms, the undersigned concludes that the mental impairments of somatoform disorder, dysthymia, and anxiety are not sufficiently severe in and of themselves to constitute a significant impairment or to significantly erode the full range of sedentary and wide range of light exertional levels. Because of the marked embellishment, apparent learning process on symptom recitation and added symptoms, and varying stories to different examiners, the undersigned misdoubts the conclusion by the psychologist that the claimant "sincerely" (sic) believes he has these physical problems." (Tr. at 61).

The ALJ was not the only observer of Plaintiff that concluded Plaintiff's recitations of pain were embellished. Dr. Michael Karathanos, M.D., who examined Plaintiff two days after a psychologist, Dr. Warren Smith, made his examination, noted that Plaintiff reported "that a couple of weeks after his accident (automobile accident in 1989) he sustained a tic disorder which

manifests itself quite frequently during this investigation with marked grimacing and tic type phenomenon of his facial muscles as well as with constant blinking" (Exhibit 37, Tr. at 412) and concluded that claimant's "neurological examination however, shows minimal findings in comparison to the patient's severe and bitter complaints of pain". Dr. Karathanos could find no motor or sensory deficits, nor any cerebellar findings or gait impairment. Dr. Karathanos found that the embellishments were so severe that they interfered with making any kind of estimate on the degree of any real limitation that the claimant may actually have had.

The Court concludes the reports of several examining doctors[1] amply support the ALJ's determination that from an objective standpoint Plaintiff's pain symptomatology is simply not credible to an extent to establish disability under the Social Security Act.

Plaintiff's initial arguments, based upon 1), the ALJ's alleged erroneous rejection of the opinions of medical experts and 2) that the ALJ did not correctly consider the Plaintiff's non-exertional impairments, specifically his emotional problems, are not persuasive. The main thrust of these arguments is the one-time psychological evaluation of Plaintiff by Warren Smith, Ph.D. at the request of the Secretary. Dr. Smith, in his written conclusions of September 4, 1992, reported that Plaintiff was disabled because of

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[1] Medical report by Hans Norberg, Tr. at 231-238; Medical report by Don Roller, M.D., Tr. at 221-230; Medical report of Ellen T. Zanstakis, M.D., Tr. at 364-373; Medical reports of Jeanne Edwards, M.D. Tr. 249-261 and 382-384, respectively (In Dr. Edwards earlier report she stated: "I am at a loss from a neurologic standpoint to find out what is wrong with this gentleman . . ."; Medical report by John E. Merriman, M.D., Tr. at 374-381.

chronic somatoform pain disorder; dysthymia or depression of many years duration and chronic generalized anxiety disorder. Dr. Smith viewed Plaintiff as disabled because of severe restriction of daily activity and constriction of interests; that Plaintiff is highly disturbed since he is very anxious, worried and depressed; that Plaintiff could understand simple job instructions but could not carry them out because of his physical and psychological problems and could not sustain work performance or cope with work pressure or get along with co-workers and supervisors.

The ALJ concluded that the final assessment by the psychologist, Dr. Smith, was unsupported by the doctor's own examination and test results[2] Substantial evidence supports the ALJ's conclusion that Plaintiff's allegations of pain were not credible to the extent that they precluded sedentary or light work.

The ALJ considered all of the evidence and concluded that Plaintiff could perform sedentary or light work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). Notwithstanding a wide range of opinions

[2] For example, Dr. Smith confronted Plaintiff with the fact that his recitation of problems in the military indicated that the claimant's symptoms of insomnia and fatigue existed long before a motor vehicle accident reported by Plaintiff as the inception of these symptoms; that Plaintiff returned the next day to Dr. Smith reciting an added history of the same problems existing since he was a teenager.

from various doctors as to Plaintiff's condition and ability to return to work, the Court concludes there is substantial evidence to support the ALJ's finding that Plaintiff is able to perform sedentary or light work.

Plaintiff argues that the ALJ did not give the proper weight to the opinions of the treating physician (Dr. Shirley Welden). A treating physician's opinion is entitled to extra weight unless it is contradicted by substantial evidence. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985); Mongeur v. Heckler, 722 F.2d 1033, 1039 (2nd Cir. 1983). Dr. Welden's opinion relates, for the most part, to the pain recitations by Plaintiff which, the ALJ concluded, were not supported by objective medical evidence.

Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence.

Plaintiff's argument 3), that the ALJ erred by not calling as a witness a Vocational Expert, and 5) that the ALJ improperly relied upon the "grids" are without merit. The ALJ concluded that Plaintiff's non-exertional mental impairment did not satisfy all of the medical criteria of the Appendix 1 listings and thereby does not significantly reduce the range of jobs Plaintiff was otherwise capable of performing such as unskilled sedentary or light work. Therefore the ALJ could properly rely exclusively upon the Medical-

Vocational Guidelines ("grids") to demonstrate that Plaintiff was not precluded from performing a significant number of jobs. Gossett v. Bowen, 862 F.2d 802 (10th Cir.1988),

Plaintiff's argument 4) is equally without merit since the determination of residual functional capacity is predicated upon the ALJ's conclusion that Plaintiff's complaints of disabling pain were not supported by the objective medical evidence.

This Court finds that there is sufficient relevant evidence in the record to support the ALJ's decision that the Plaintiff is able to perform sedentary or light work and that therefore Plaintiff is not disabled as defined by the Social Security Act and the Regulations thereunder. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 26th DAY OF September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CAROL J. BATTIEST, Plaintiff, vs. AMERICAN PAGING COMPANY INC., and LLOYD EWTON, Defendants.	)	No. 93-C-0143-BK ENTERED SEP 27 1994 DATE

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff CAROL J. BATTIEST and the Defendants AMERICAN PAGING COMPANY INC. OF OKLAHOMA and LLOYD L. EWTON, by and through their respective counsel, jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims, and stipulate pursuant to Fed.R.Civ.P. 41(a)(i)(ii) that Plaintiff's claims are dismissed with prejudice, the parties to bear their own respective costs and attorney fees.

Respectfully submitted,

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-and-

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ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DORTHY W. STITH aka DOROTHY W. STITH; CITY OF TULSA, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

SEP 27 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 463E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of September, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **City of Tulsa, Oklahoma**, appears by Russell R. Linker II, Assistant City Attorney; and the Defendant, **Dorthy W. Stith aka Dorothy W. Stith**, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the **Defendant, Dorthy W. Stith aka Dorothy W. Stith**, will hereinafter be referred to as **("Dorthy W. Stith")**.

The Court being fully advised and having examined the court file finds that the **Defendant, City of Tulsa, Oklahoma**, acknowledged receipt of Summons and Complaint via certified mail on May 6, 1994.

ENTERED ON DOCKET
DATE 9-24-94

The Court further finds that the Defendant, Dorthy W. Stith, was served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning June 30, 1994, and continuing through August 4, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Dorthy W. Stith, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendant, Dorthy W. Stith. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of

residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 23, 1994; that the Defendant, **City of Tulsa, Oklahoma**, filed its Answer on May 16, 1994; and that the Defendant, **Dorthy W. Stith**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Twenty (20), Block Eleven (11), SUBURBAN ACRES SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on December 30, 1983, Clarence W. Trent and Tillie Trent, executed and delivered to RYAN MORTGAGE COMPANY their mortgage note in the amount of $32,550.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Clarence W. Trent and Tillie

Trent, husband and wife, executed and delivered to RYAN MORTGAGE COMPANY a mortgage dated December 30, 1983, covering the above-described property. Said mortgage was recorded on January 5, 1984, in Book 4757, Page 538, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 23, 1990, Knutson Mortgage Corporation assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 30, 1990, in Book 5249, Page 2493, in the records of Tulsa County, Oklahoma; further, this mortgage was not held by Knutson Mortgage Corporation at the time of the assignment.

The Court further finds that on July 29, 1987, Ryan Mortgage Company assigned the above-described mortgage note and mortgage to Westmark Mortgage Corporation. This Assignment of Mortgage was recorded on August 20, 1987, in Book 5046, Page 1622, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 19, 1990, Westmark Mortgage Corporation assigned the above-described mortgage note and mortgage to Government National Mortgage Association. This assignment of Mortgage was recorded on October 4, 1990, in Book 5281, Page 630, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 3, 1990, Government National Mortgage Association assigned the above-described mortgage note and mortgage tot he Secretary of Housing

The Court further finds that on October 3, 1990, Government National Mortgage Association assigned the above-described mortgage note and mortgage tot he Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 4, 1990, in Book 5281, Page 631, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Dorthy W. Stith, currently holds record title to the property by virtue of a Warranty Deed dated July 27, 1989, and recorded on July 27, 1989 in Book 5197, Page 675, in the records of Tulsa County, Oklahoma. The defendant, Dorthy W. Stith, is the current assumptor of the subject indebtedness.

The Court further finds that on March 1, 1990, the Defendant, Dorthy W. Stith, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, Dorthy W. Stith, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Dorthy W. Stith, is indebted to the Plaintiff in the principal sum of $52,782.30, plus interest at the rate of 12.5 percent per annum from April 1, 1994 until

which is the subject matter of this action by virtue of personal property taxes in the amount of $15.00 which became a lien on the property as of June 26, 1992; and a lien in the amount of $6.00, which became a lien as of June 25, 1993; and a claim against the subject property in the amount of $6.00 for the tax year 1993. Said liens and claim are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendant, **Dorthy W. Stith**, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, **City of Tulsa, Oklahoma**, disclaims any right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Dorthy W. Stith**, in the principal sum of $52,782.30, plus interest at the rate of 12.5 percent per annum from April 1, 1994 until judgment, plus

interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $27.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Dorthy W. Stith, City of Tulsa, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Dorthy W. Stith**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $27.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 94-C 463E

NBK:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLARENCE WAYNE BOGGS; DELILAH P. BOGGS; KISHOR N. MEHTA; JYOTSNA K. MEHTA; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-382-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22nd day of Sept., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS, KISHOR N. MEHTA and JYOTSNA K. MEHTA, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, KISHOR N. MEHTA, acknowledged receipt of Summons and Complaint on May 10, 1993; that the Defendant, JYOTSNA K. MEHTA, acknowledged receipt of Summons and Complaint on May 9, 1993; that the Defendant, CLARENCE WAYNE BOGGS, was served a copy of Summons and Complaint on April 25, 1994; the Defendant, DELILAH P. BOGGS, was served a

copy of Summons and Complaint on April 25, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on May 13, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 29, 1993.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 27, 1993; and the Defendants, KISHOR N. MEHTA; and JYOTSNA K. MEHTA, have failed to answer and default has therefore been entered by the Clerk of this Court.

It appears that the Defendants, CLARENCE WAYNE BOGGS, and DELILAH P. BOGGS, filed a response to the foreclosure action, reciting their bankruptcy information, on May 27, 1994, but have otherwise failed to appear further and default has therefore been entered by the Clerk of this Court.

The Court further finds that on April 30, 1993, Clarence Wayne Boggs and Delilah P. Boggs, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-01442-C. On August 25, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor, the case was subsequently closed on December 30, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-Four (24), Block One (1), HIDDEN SPRINGS, an addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on March 7, 1979, Ronnie Lee Davis and Leslie B. Davis, husband and wife, executed and delivered to First Continental Mortgage Co., a corporation, a mortgage note in the amount of $48,050.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Ronnie Lee Davis and Leslie B. Davis, husband and wife, executed and delivered to First Continental Mortgage Co., a mortgage dated March 7, 1979, covering the above-described property. Said mortgage was recorded on March 13, 1979, in Book 4386, Page 1529, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 18, First Continental Mortgage Co., assigned the above-described mortgage note and mortgage to Federal National Mortgage Association. This Assignment of Mortgage was recorded on April 23, 1979, in Book 4394, Page 1090, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 15, 1987, Federal National Mortgage Association, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 17, 1988, in Book 5081, Page 714, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 14, 1979, Ronnie Lee Davis and Leslie B. Davis, granted a general warranty deed to Norman J. Gerlach and Freida Gerlach. This deed was recorded with the Tulsa County Clerk on November 16, 1979, in Book 4441 at Page 1252, and Norman J. Gerlach and Freida Gerlach, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on January 19, 1981, Norman J. Gerlach and Freida Gerlach, granted a general warranty deed to the Defendants, KISHOR N. MEHTA and JYOTSNA K. MEHTA. This deed was recorded with the Tulsa County Clerk on January 28, 1981, in Book 4523 at Page 1389, and the Defendants, KISHOR N. MEHTA and JYOTSNA K. MEHTA, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on December 24, 1985, the Defendants, KISHOR N. MEHTA and JYOTSNA K. MEHTA, granted a general warranty deed to the Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS. This deed was recorded with the Tulsa County Clerk on December 31, 1985, in Book 4915 at Page 2538, and the Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on September 1, 1987, the Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on April 1,

1988; June 1, 1989; June 1, 1990; November 1, 1991; and May 1, 1992.

The Court further finds that the Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS, are indebted to the Plaintiff in the principal sum of $62,380.16, plus interest at the rate of Nine and One-Half percent per annum from April 27, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $17.00 which became a lien on the property as of June 1988; property taxes in the amount of $11.00 which became a lien on the property as of June 1991; property taxes in the amount of $47.00 which became a lien on the property as of June 1992; property taxes in the amount of $49.00 which became a lien on the property as of June 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, CLARENCE WAYNE BOGGS, DELILAH P. BOGGS, KISHOR N. MEHTA, and JYOTSNA K. MEHTA, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS, in the principal sum of $62,380.16, plus interest at the rate of Nine and One-Half percent per annum from April 27, 1993 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $124.00 for personal property taxes for the years 1987, 1990, 1991, 1992, plus accrued and accruing interest, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County,

Oklahoma, CLARENCE WAYNE BOGGS, DELILAH P. BOGGS, KISHOR N. MEHTA and JYOTSNA K. MEHTA, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, CLARENCE WAYNE BOGGS and DELILAH P. BOGGS, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $124.00, plus accrued and accruing interest for, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-382-B
PP:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOBIN DON LEMMONS,

Plaintiff,

vs.

BRUCE DUNCAN, et al.,

Defendants.

No. 93-C-363-B

ENTERED ON DOCKET
DATE 9/23/94

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment [docket #15], the Court hereby enters judgment in favor of Defendants Bruce Duncan, Brant Green, Jim Wall, Dan Jones and the Sapulpa Police Department and against the Plaintiff, Tobin Don Lemmons . Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 22nd day of Sept, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 9/23/94

CECIL FAYE SHRUM, INDIVIDUALLY, AND AS SURVIVING SPOUSE AND NEXT OF KIN OF JILES DEAN SHRUM, DECEASED,

Plaintiff,

VS.

FIBERBOARD CORPORATION, et. al.,

Defendants,

Case No. 90-C-1031-B

FILED
SEP 22 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the Motion for Partial Summary Judgment of Defendants Armstrong World Industries, Inc. (f/k/a/ Armstrong Cork Company), Flexitallic, Inc. (f/k/a Flexitallic Gasket company, Inc.), and GAF Corporation (Defendants), individually and as liaison for all Defendants against Cecil Faye Shrum (Plaintiff) as surviving spouse of Jiles Dean Shrum (Decedent).

Undisputed facts

1. Plaintiff filed her initial complaint on December 17, 1990 alleging that her Decedent was injured as a result of exposure to asbestos-containing products of the Defendants.

2. Decedent died on January 9, 1989. (See Defendants' Motion for Summary Judgment Exhibit "A").

3. Decedent's medical records indicate that during a period from December 5, 1988 to December 12, 1988, Decedent was admitted to Hillcrest Medical Center and numerous tests were performed which revealed that he was suffering from either a lung cancer or

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mesothelioma, that his doctors knew about his asbestos exposure, and that these diagnoses were discussed with Plaintiff and her Decedent. (See Defendants' Motion for Summary Judgment Exhibit "A")

4. Defendants filed, on March 1, 1994, a Joint Motion for Summary Judgment alleging the statute of limitations has expired as set forth in Okla. Stat. Ann. tit. 12, § 95 (West 1988). On March 3, 1994 Plaintiff's counsel wrote to defense liaison counsel advising him that there is a distinction between the statute of limitations as it applies to the Oklahoma Survival Statute, Okla. Stat. Ann. tit. 12, § 1051 (West 1988), and the Oklahoma Wrongful Death Statute, Okla. Stat. Ann. tit. 12 § 1053 (West 1988). (See Plaintiff's Response to Defendant's Motion for Summary Judgment Exhibit "A"). Immediately thereafter, on March 4, 1994, Defendants Owens-Corning Fiberglas Corporation filed a request to withdraw its motion for Summary Judgment. Additionally, on March 8, 1994, defense liaison counsel, on behalf of the remaining Defendants' participation in the Motion for Summary Judgment, filed an amendment withdrawing their Motion as it applies to the Oklahoma Wrongful Death Statute. Id.

5. Defendants are still asserting their Motion for Summary Judgment, to the extent it is applicable under the Oklahoma Survival Statute. Okla. Stat. Ann. tit. 12, § 1051 (West 1988).

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> [T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

> [T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . . . Id. at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex

and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

Defendants move for Partial Summary Judgment alleging that the statute of limitations as set forth in Okla. Stat. tit. 12, § 95 as it pertains to the Oklahoma Survival Statute, has expired. All parties agree that the statute of limitations for a wrongful death action as set forth in Okla. Stat. tit. 12, §1053, has not expired.

Oklahoma has adopted the discovery rule as a means for determining when the statute of limitations should begin to run in a products liability case. See Daugherty v. Farmers Co-op. Ass'n, 689 P.2d 950 (Okla. 1984) (Recognizing the approval of the use of the discovery rule in Oklahoma in products liability cases). The discovery rule, when properly limited, "[s]hould encompass the precept that acquisition of sufficient information which, if pursued, would lead to the true condition of things will be held as sufficient knowledge to start the running of the statute of limitations." Id. at 950, 951 (Citing Young v. International Paper Co., 155 So. 231). With respect to asbestos exposure "[c]ausally connected with employment, a claim may be filed within two (2) years from the date said condition first becomes manifest by a symptom or condition from which one learned in medicine could, with reasonable accuracy, diagnose such specific condition." Coy v. Dover Corp./Norris Div., 773 P.2d 748 (Citing 85 O.S Supp. 1987, § 43).

It is undisputed that between the dates of December 5, 1988 and December 12, 1988, the decedent was admitted to Hillcrest

Medical Center and had numerous tests performed. The physicians' reports that were generated as a result of the decedent's stay at Hillcrest Medical Center indicate that the decedent had "[s]ufficient information which, if pursued, would lead to the true condition of things." Daugherty, 689 P.2d 950. (See Defendant's Motion for Summary Judgment Exhibit "A" for Hillcrest Medical Center physicians' reports).

The Decedent was examined at Hillcrest Medical Center on December 6, 1988 by Dr. R.H. Stickney. Dr. Stickney's x-ray report from the December 6 examination revealed in the decedent, several chest and lung abnormalities. Dr. Stickney's report suggests malignancy as the most likely explanation for the abnormalities.

The physician's report dated December 7, 1988, and signed by Dr. Gerald Plost, M.D., indicates that the decedent was examined on December 7 and for three weeks prior had been suffering shortness of breath and dyspnea on exertion. Decedent did not complain of chest pain during the December 7 examination but a very large pleural effusion was found on his x-ray and some mediastinal adenopathy was noted on the C.T. scan of his chest. Dr. Plost's December 7 report and the progress notes that follow, also dated December 7, 1988, indicate that Dr. Plost was aware of the Decedent's asbestos exposure.

The December 8, 1988 Pleural Biopsy Report, from decedent's surgery of December 7, 1988, signed by pathologist Sandra K. Dimmitt, M.D., indicated that the pleural effusion was either a

adenocarcinoma[1] or a mesothelioma[2]. Although difficult to differentiate between adenocarcinoma and mesothelioma, the biopsy report indicates that the tissue removed was more likely malignant than not.

Dr. Dimmitt's findings are supported by the findings of Dr. Gilbert Maw. In his Pathology Report from the decedent's surgery of December 8, 1988, dated December 12, 1988, Dr. Maw confirms that there were malignant cells present in the tissue removed from the decedent and that his findings mediate against a mesothelioma.

It is undisputed that both the Decedent and his wife, after the Decedent's doctors confirmed the finding of malignant cells, were informed of the Decedent's condition. The Decedent and his wife were first informed of the malignant cells no later than December 9, 1988. By the time the Decedent was discharged from Hillcrest Medical Center on December 12, 1988, his condition was manifested by symptoms and conditions of which the Decedent, his wife, and his doctors were aware.

The Decedent, after being discharged from Hillcrest Medical Center had sufficient knowledge "[t]o put a reasonable man upon inquiry." Daugherty, 689 P.2d 951. According to Oklahoma law and its interpretation of the discovery rule as it applies to products liability case, the plaintiff, where the means of knowledge

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[1] A malignant tumor originating in glandular epithlium <of the breast>. Webster's Third New International Dictionary (1961)

[2] A benign tumor derived from mesothelial tissue (as that lining the perittoneurm or pleura). Webster's Third New International dictionary (1961).

existed, and where the plaintiff was put upon reasonable inquiry, "The[] plaintiff is chargeable with the knowledge such inquiry would have produced, and the discovery rule does not . . . bar the running of the statute of limitations." Id.

Conclusion

Decedent's medical records indicate, and it is undisputed, that the Decedent was attended to by the physicians at Hillcrest Medical Center beginning December 5, 1988 and ending December 12, 1988. The Decedent, prior to and during his stay at Hillcrest Medical Center, by experiencing symptoms of chest and lung abnormalities, and by receiving the results of the test performed by the attending physicians, acquired sufficient knowledge to put a reasonable man upon inquiry. Upon the Decedent's acquisition of the existent reasonable knowledge, which occurred no later than December 12, 1988, the Decedent then had two years in which to file a claim against the Defendants. Given the latest possible date of acquisition of knowledge, the statute of limitations for the Decedent's Survival claim, Okla. Stat. tit. 12, § 1051 (West 1988) expired on December 12, 1990, pursuant to Okla. Stat. tit. 21, § 95 (West 1988). The Plaintiff for the Decedent filed her initial complaint, seeking relief under the Oklahoma Survival Statute, on December 17, 1990, 5 days after the statute of limitations had expired. For these reasons the Defendants' Motion for Partial Summary Judgment is granted.

The parties discussed, but made no differentiation, between the damages available under the Oklahoma Wrongful Death Statute and

the Oklahoma Survival Statute. The Court is of the view, but does not herein decide, that such a difference exists. Any delineation between the Wrongful Death action which was timely filed and the Survival Action which is precluded by the statute of limitations, as to damages recoverable, will be appropriately handled at the instruction phase of the case.

The Court, without discussion, denies Plaintiff's motion for attorney's fees on the grounds that Defendant's instant Motion was frivolously brought.

IT IS SO ORDERED this 22nd day of September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DON AUSTIN, an individual, BARBARA WILLIS, an individual, DOROTHY COOKS, an individual, KAREN SNAP, an individual, and other JOHN DOE or JANE DOE Plaintiffs as they become known,

Plaintiffs,

vs.

SUN REFINING AND MARKETING COMPANY,

Defendant.

Case No. 92-C-258-BU

ORDER

This matter comes before the Court upon the Application to Dismiss Without Prejudice Plaintiffs, David Berger, Doris Berger, Dr. Carl R. Johnson and Debbie Mendoza. Having reviewed the application and noting from the Court file that no objection has been filed by Defendant to the application, the Court hereby GRANTS the application. The action of Plaintiffs, David Berger, Doris Berger, Dr. Carl R. Johnson and Debbie Mendoza, against Defendant Sun Refining and Marketing Company is hereby DISMISSED WITHOUT PREJUDICE.

ENTERED this 22nd day of September, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

28

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELECTRICAL POWER SYSTEMS, INC.,)
)
Plaintiff,)
vs.) Case No. 94-C-158-BU
)
ARGO INTERNATIONAL CORPORATION,)
)
Defendant.)

ORDER

On August 5, 1994, United States Magistrate Judge Jeffrey S. Wolfe issued a Report and Recommendation with respect to the plaintiff's Motion for Summary Judgment (Docket No. 4). In the Report and Recommendation, Magistrate Judge Wolfe recommended that summary judgment be granted and that the plaintiff be awarded the principal sum of $106,744.00. He also recommended that the plaintiff be awarded monthly interest of $1,601.16, reasonable storage costs since November 27, 1993, the costs of the lawsuit and a reasonable attorney's fee as provided for in 12 O.S. § 936.

This matter now comes before the Court upon the defendant's objection to the Report and Recommendation. The defendant objects to Magistrate Judge Wolfe's recommendation that the plaintiff be granted pre-judgment interest at the rate of 18% per annum and in the amount of $1,601.16 per month. The defendant contends that there is no evidence in the record that the defendant and the plaintiff agreed that interest would accrue on unpaid balances at the rate of 18% per annum.

In response, the plaintiff has submitted a document entitled "Terms of Sale" which states that all past due invoices will be subject to 18% interest per annum. The plaintiff states that it sent the document to the defendant when it acknowledged the

defendant's order for the two electrical switchgear assemblies which are the subject of this action.

The defendant, in reply, has submitted the affidavit of its president, John Calicchio. Mr. Calicchio states that he has reviewed the defendant's file relating to this matter and that the invoice sent by the plaintiff does not contain the "Terms of Sale" document.

Having conducted a de novo review of this matter, the Court agrees with and ADOPTS Magistrate Judge Wolfe's Report and Recommendation to the extent that it recommends judgment be granted in favor of the plaintiff and that the plaintiff be awarded the unpaid contract price of $106,744.00, reasonable storage costs since November 3, 1993, the costs of the lawsuit and a reasonable attorney's fee. The Court, however, disagrees with and REJECTS Magistrate Judge Wolfe's Report and Recommendation to the extent it recommends that the plaintiff be awarded pre-judgment interest at 18% per annum. The Court finds that the plaintiff has failed to present sufficient evidence to establish that the document entitled "Terms of Payment" was actually sent to and received by the defendant. Thus, the Court finds that the plaintiff is only entitled to recover statutory pre-judgment interest, which is currently at 5.69% per annum.

Based upon the foregoing, the Court hereby GRANTS the plaintiff's Motion for Summary Judgment (Docket No. 4). The parties are DIRECTED to submit a proposed judgment for the Court's approval within seven (7) days from the date of this Order. If the

parties, after conferring in good faith, cannot agree as to the appropriate amount of storage costs, costs of lawsuit and attorney's fee to be awarded to the plaintiff, the parties shall submit the proposed judgment leaving blanks for the storage costs, costs of suit and attorney's fee. The plaintiff shall file a motion in regard to costs and attorney's fees for the Court's determination.

ENTERED this 22nd day of September, 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOBIN DON LEMMONS,

Plaintiff,

vs.

BRUCE DUNCAN, et al.,

Defendants.

No. 93-C-363-B

ORDER

In this prisoner's civil rights action, Plaintiff Tobin Don Lemmons alleges that Officers Brant Green and Dan Jones arrested him and searched his car without a warrant in violation of his Fourth Amendment right and that Officers Bruce Duncan "assaulted and battered" him in the hallway of the Creek County Courthouse. The Defendants have moved for summary judgment in their favor. Plaintiff has objected to Defendants' motion and has moved to amend his complaint. After carefully reviewing the record in this case, the Court concludes that Plaintiff's motion to amend should be granted in part and denied in part, and that Defendants' motion for summary judgment should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff became a suspect for a burglary in Sapulpa, Oklahoma, between 6:00 p.m. on August 5, 1992, and 5:30 a.m. on August 6, 1992, when an Oklahoma Highway Patrol Trooper observed a suspicious car pulling away from the area near the burglary scene during the night and a check with the State Motor Vehicle Records Department revealed that the car was licensed to Plaintiff and that

Plaintiff was residing in Tulsa, Oklahoma. On the afternoon of August 6, Bruce Duncan, Brant Green, Jim Wall, and Dan Jones, Sapulpa Police detectives, traveled to Tulsa to investigate the burglary. The Officers stopped first at the address listed on Plaintiff's motor vehicle registration, but learned that Plaintiff and his wife were believed to be staying in a motel located along Highway 244 in west Tulsa. Consequently, the Officers drove along Highway 244, until they located Plaintiff's vehicle in the parking lot of the Winston Motel. At that time they asked the Sapulpa Police Department to contact the Tulsa County Sheriff's Department to send deputies to the Winston Motel. Plaintiff's vehicle, however, pulled out of the parking lot and officers Green and Jones began following it down Highway 244 West into a residential area. When Plaintiff stopped in the driveway of a house, Officer Green pulled into the driveway behind Plaintiff's vehicle and spoke with Plaintiff for several minutes. An officer from the Tulsa Police Department, who had been contacted in the meanwhile, advised Plaintiff's wife of her Miranda rights and requested permission to look into the trunk of the car. Plaintiff's wife said that the officer could look into the trunk, but that she had no key. The Tulsa officer then reached into Plaintiff's vehicle, opened the glove compartment and pushed the trunk disconnect button. Jones, who worked part-time at the burglarized business, identified tools, equipment, and tool boxes in the trunk of Plaintiff's vehicle as those reported stolen during the burglary. The Tulsa officer then arrested Plaintiff for knowingly concealing stolen property and

impounded Plaintiff's vehicle and the evidence contained in it.

In April 1993, Plaintiff filed the present action on his behalf and on behalf of his wife, Michelle Lemmons, against Bruce Duncan, Brant Green, Jim Wall, Dan Jones, and the Sapulpa Police Department.[1] Plaintiff alleged that the Sapulpa police officers violated his Fourth Amendment right when they arrested him and searched his vehicle without a search warrant and acting outside their jurisdiction. Plaintiff also alleged a claim for assault and battery against Duncan as a result of events which occurred in the hallway of the Creek County Courthouse on September 9, 1992. He alleged that Duncan "violently shoved and hit" him in the back and verbally threatened him. Plaintiff sought damages and expungement of the charges pending in Creek and Muskogee County. (Doc. #1.)

In October 1993, Defendants Duncan, Green, Wall, Jones, and the Sapulpa Police Department moved for summary judgment under Fed. R. Civ. P. 56. They argued the City of Sapulpa was entitled to judgment as a matter of law because there was no factual or legal basis for Plaintiff's claim against it, and the officers were entitled to judgment as a matter of law because they had a right to leave their jurisdiction to investigate a crime committed within their jurisdiction and because the search and seizure at issue was conducted by Tulsa police officer K.T. McCoy. As to the alleged

---

[1]Plaintiff also sued Larry Fugate, the Creek County Sheriff's Department, and David Bates, the Oklahoma Highway Patrolman who reported seeing Plaintiff's car near the scene of the crime. The Court previously entered summary judgment in favor of Larry Fugate and the Creek County Sheriff's Department (docs. #51 and #53), and notified Plaintiff that Bates may be dismissed for lack of service under Fed. R. Civ. P. 4(m) (doc. #50).

assault and battery, Defendants argued that a mere push or shove did not violate Plaintiff's constitutional right. (Docs. #16.)

In November 1993, Plaintiff moved for leave to amend his complaint to add Tulsa Police Officer K.T. McCoy and filed conclusory objections to Defendants' motion. He contended that Defendants' affidavits were frivolous and that they implicated unknown officers in an effort to escape liability. (Docs. #26 and #27.) In July 1994, the Court denied Plaintiff's motion to amend because it was not accompanied by a proposed amended complaint, and granted Plaintiff an opportunity to comply with Local Rule 9.3.C. On August 9, 1994, Plaintiff timely filed a second motion for leave to amend along with a proposed amended complaint. In his amended complaint, Plaintiff names as additional defendants unknown Tulsa police officers involved in his arrest and search of his vehicle, and alleges an action on behalf of his wife, Michelle Lemmons, for kidnapping by the Creek County Police Officers.[2] (Doc. #54.)

Defendants do not object to Plaintiff's motion to amend to the extent that it restates the claims alleged in the original complaint against Duncan, Green, Wall, Jones, and the Sapulpa Police Department. They object, though, to Plaintiff's attempt to assert a claim on behalf of Michelle Lemmons on the ground that she did not sign the original complaint in this case.

[2]Although Plaintiff's motion to amend names officer K.T. McCoy as a Defendant, Plaintiff's proposed amended complaint only names unknown Tulsa police officers.

II. ANALYSIS

The Court will address first Plaintiff's motion for leave to amend and second Defendants' motion for summary judgment.

A. Motion for Leave to Amend the Complaint

In light of Plaintiff's pro se status, and in light of Federal Rule of Civil Procedure 15(a)'s requirement that leave to amend be "freely given," the Court concludes that Plaintiff's motion to amend the complaint to add police officers from the city of Tulsa as defendants should be granted. The Court denies, however, Plaintiff's request to amend his complaint to allege a kidnapping claim on behalf of his wife Michelle Lemmons. Although Michelle Lemmons was named as a plaintiff in the original complaint, the Court notes that she never signed the original complaint, the proposed amended complaint, or any other pleadings in this case. Federal Rule of Civil Procedure 11 states that all papers must be signed by the party's attorney, if the party is represented by counsel, or by the party, if he or she is not represented by an attorney. Plaintiff Lemmons is obviously not an attorney, and cannot act as an attorney for Plaintiff Michelle Lemmons. Accordingly, the Court denies Plaintiff's motion to amend the complaint to allege a kidnapping claim on behalf of Michelle Lemmons. The Court also orders the Clerk of the Court to dismiss Plaintiff Michelle Lemmons for lack of prosecution.

B Summary Judgment

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a

genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

2. Sapulpa Police Department/City of Sapulpa

After liberally construing plaintiff's pro se pleadings for purposes of summary judgment, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that judgment as a mater of law should be entered in favor of the Sapulpa Police Department. The Plaintiff has not challenged Defendants' contention in their motion for summary judgment (1) that the City of Sapulpa is the proper party, rather than the named Sapulpa Police Department, and (2) that the Plaintiff has not presented any factual or legal basis for a claim against it in this case--e.g. that the city had a policy of failing to adequately train or supervise the police officers. See Monell v. New York City Department of Social Services, 436 U.S. 658 (1978); City of Canto, Ohio v. Harris, 489 U.S. 378 (1989). Accordingly, Defendants' motion for summary judgment should be granted as to the City of Sapulpa.

3. Unlawful Arrest and Search and Seizure by Green and Jones

In Count I of his amended complaint, Plaintiff alleges that Defendants Green and Jones illegally searched and seized his vehicle without a search warrant or probable cause while they were out of their jurisdiction. Defendants Green and Jones argue that they are entitled to summary judgment based on the doctrine of qualified immunity. In the alternative, they argue that they did

not conduct any search or perform any seizure of Plaintiff's property, but rather let the Tulsa Police Department conduct the search and seizure at issue in this action.

Under qualified immunity, an official performing discretionary functions is immune from suit for actions objectively reasonable in light of clearly established law. See Anderson v. Creighton, 483 U.S. 635, 639-41 (1987); Chapman v. Nichols, 989 F.2d 393, 397 (10th Cir. 1993). A claim of qualified immunity presents a question of law about whether the officer's actions were objectively reasonable. Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991). The Court cannot avoid the question of qualified immunity by "framing it as a factual issue." Workman v. Jordan, 958 F.2d 332, 336 (10th Cir. 1992). Qualified immunity is "an immunity from suit rather than a mere defense to liability." Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990).

Once the defense of qualified immunity is raised, it is the plaintiff's burden to convince the Court that the law was clearly established. Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). The "plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant violated it." Id. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. 640.

Plaintiff contends that defendants violated his right to be free from unreasonable searches and seizure. As noted above,

simply alleging violation of such a general right does not meet the test articulated in Anderson, 483 U.S. at 640. The Court must inquire whether it was "clearly established that the circumstances with which . . . [Green and Jones were] confronted did not constitute probable cause and exigent circumstances." Id.

After viewing the summary judgment evidence in the light most favorable to the Plaintiff, the Court cannot conclude that the conduct of Green and Jones contravened any constitutional principles so "clearly established" that they as reasonable officers "would understand that what [they] . . . were doing violate[d] that right." Id. Green and Jones were properly conducting an investigation of a crime committed within their jurisdiction, and they had probable cause to believe that Plaintiff's vehicle, which had been seen near the scene of the burglary, contained stolen property. See United States v. Ross, 456 U.S. 798 (1982) (permitting warrantless search of vehicle believed to contain contraband). Accordingly, the Court concludes that even if the officers assisted in the search and seizure at issue in this case, the information available to Green and Jones provided sufficient basis for a finding that they were acting within the protection of the qualified immunity discussed in Anderson. Therefore, Defendants' motion for summary judgment should be granted as to Defendants Green and Jones.

4. Jim Wall

Plaintiff has not alleged any claims against Defendant Jim

Wall. Defendants' summary judgment evidence further shows that Wall, who had accompanied Duncan, had remained at the Winston Motel with Duncan to conduct investigations there and was not present during the search and seizure. Accordingly, Wall is entitled to judgment as a matter of law on Count I and II of Plaintiff's amended complaint.

5. Battery and Assault by Bruce Duncan

Plaintiff also alleges that Bruce Duncan pushed and showed him and verbally threatened him while he was in handcuffs and leg irons in the hallway of the Creek County Courthouse following his preliminary hearing. Defendants contend that even if Duncan pushed and showed Plaintiff those acts did not amount to a constitutional violation, citing Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973) (not every malevolent touch by a prison guard gives rise to a federal cause of action). The Court agrees. While the conduct alleged in Plaintiff's complaint is unfortunate, and potentially illegal under state law, it does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. In fact, de minimis applications of force are excluded from the Eighth Amendment's cruel and unusual punishment calculation. Hudson v. McMillian, 112 S.Ct. 995, 1000 (1992); see also Sampley v. Ruettgers, 704 F.2d 491, 494 (10th Cir. 1983); El'Amin v. Pearce, 750 F.2d 829 (10th Cir. 1984). The same holds true of verbal taunts and harassment, as alleged in Plaintiff's complaint. Compare Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979)

(allegation that sheriff laughed at prisoner and threatened to hang him was not sufficient to state constitutional deprivation under section 1983), with Northington v. Jackson, 973 F.2d 1518, 1522-24 (10th Cir. 1992) (allegation that police captain put revolver to inmate's head and threatened to kill him stated an excessive force claim under the Eighth Amendment). Accordingly, Defendant Duncan is entitled to judgment as a matter of law on this claim.[3]

IV. CONCLUSION

After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Plaintiff's motion to amend complaint (doc. #55) is granted with regard to Plaintiff's request to add as Defendants unknown Tulsa police officers, but denied with regard to his request to add a kidnapping claim on behalf of Plaintiff Michelle Lemmons.

(2) The Clerk shall file Plaintiff's amended complaint attached to his motion for leave to amend (doc. #55) and mail to the Plaintiff summons and marshall forms for

[3]The Court declines to analyze Plaintiff's "battery and assault" claim under state law because in his second amended complaint Plaintiff alleges this claim only as a federal claim under section 1983.

service on the unknown Tulsa police officers named in the amended complaint.

(3) Michelle Lemmons is dismissed as a plaintiff in this case for lack of prosecution.

(4) Defendants' motion for summary judgment (doc. #15) is granted.

SO ORDERED THIS 22nd day of Sept., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE SEP 22 1994

EDNA J. FORCUM,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 91-C-577-B

FILED
SEP 22 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court for consideration is Plaintiff Edna J. Forcum's appeal (Docket #2), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits.

Plaintiff asserts that her disability began on July 31, 1984, due to severe asthma, chronic bronchitis, obstructive pulmonary disease, mild osteoarthritis, extreme nervousness and severe depression. Plaintiff previously applied for, and was denied, Title II and XVI disability benefits on August 13, 1984, February 14, 1985, September 17, 1986. Plaintiff filed her current application on April 6, 1988. This application was denied by the ALJ on October 30, 1989. The Appeals Council affirmed the ALJ's decision. Plaintiff now has sought judicial review.

Plaintiff asserts that the ALJ failed to give substantial weight to the evidence and the treating physician's opinion that Plaintiff is disabled, and failed to give specific, legitimate reasons for rejecting the treating physician's opinion.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423 (d)(1)(A). An individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521

(10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial "if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app.

1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920. In this case, the ALJ entered a decision at the fourth level of the inquiry, finding that Plaintiff can perform her past relevant work as a provider. As a provider, Plaintiff cooked a light lunch and worked five hours a day, seven days a week, taking care of her mother and father-in-law. She changed bed sheets and made certain they took their medication (Tr. 13).

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent her from performing her past relevant work. The Court does not interpose its judgment for that of the ALJ. The following is a brief summary of some of the relevant medical evidence presented to the ALJ.

On March 3, 1988, Plaintiff told doctors at the Miami PHS Indian Health Center she had wheezing and labored breathing, which

was eased temporarily by medication (Tr. 682). She was hospitalized on March 5, 1988, due to right lower lobe pneumonia and respiratory distress. Her condition responded to treatment. She was discharged from the hospital on March 14, 1988 (Tr. 696-8).

Dr. Moore, one of Plaintiff's treating physicians, reported that "[b]ecause of her health problems, she has been unable to hold a job and I doubt she will ever be able to work again" (Tr. 712). However, on June 7, 1988, Dr. Mourning, a consultative examiner, diagnosed Plaintiff as having chronic obstructive pulmonary disease with mild to moderate bronchospasm at the time and probable chronic bronchitis. He also diagnosed exogenous obesity, osteoarthritis involving jaw, hands and knees, with a question of severity, and "probable situational depression" (Tr. 702). There were no reasons given in the report for this probable depression. Plaintiff had some wheeze and rhonchi on forced expiration. Range of motion test results showed only minimum obstructions (Tr. 701). He noted that she smoked one to one-and-a-half packs of cigarettes a day for 36 years, but allegedly quit in March 1988.

Notes from the Indian Health Center stated that Plaintiff did fairly well with her "chronic moderately severe asthma" over the summer of 1988, but that she had re-started smoking cigarettes (Tr. 742). Physical examinations done in December 1988, April 1989 and August 1989 indicated that her chronic problems were stable. (Tr. 729, 735-8).

Plaintiff was hospitalized for four days, starting on September 11, 1989, for right lower lobe pneumonia, which had

exacerbated her asthma. Her pulmonary condition improved with treatment. Plaintiff said she suffered no pain or shortness of breath, so she was released and allowed to resume her normal activity level (Tr. 773).

Plaintiff was sent to Dr. Bhend for a consultative psychiatric examination on June 27, 1988. Dr. Bhend's report indicated that, although Plaintiff appeared tense and sad, with slowed speech and reduced motor behavior, her thought association patterns were coherent, she was fully oriented, her calculations were correct, her memory was intact, her retention and recall were normal, and her insight was deemed to be fairly good. She did not have any evidence of thought blocking, thought disorganization, ideas of reference, paranoid thoughts or hallucinations (Tr. 715-16). He diagnosed Plaintiff as having major depression, which lowers "an already severely impaired energy level." Id. He said that Plaintiff had a low tolerance for stress, would have difficulty performing repetitive tasks and interacting with others, and that her inability to concentrate and engage in sustained activity limited her ability to engage in sedentary activity (Tr. 717).

The ALJ can decide to believe all or any portion of any witness's testimony or evidence. The ALJ found Dr. Bhend's opinion to be inconsistent with the medical record. Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988).

The medical adviser, Dr. Gordon, testified that Dr. Bhend's

report had several inconsistencies because Dr. Bhend's mental status examination (the objective findings) were inconsistent with Dr. Bhend's opinion. Dr. Gordon believed Dr. Bhend's opinion was based upon Plaintiff's subjective statements to him, and not upon the objective clinical findings. In addition, he stated that other medical evidence in Plaintiff's history does not support Dr. Bhend's opinion (Tr. 89). "The problem with depression really never seemed to come to the surface until the very recent history and perhaps after the loss of her husband" (Tr. 86). He noted that Plaintiff's own list of complaints to Dr. Bhend listed in the report doesn't mention depression. Id. Dr. Gordon stated that his opinion was based on a "longitudinal point of view" of Plaintiff's history. Id. He stated that the objective medical records in the consultative physician's report did not indicate a disabling mental impairment; rather, they were within normal limits (Tr. 87). He also noted that none of Plaintiff's treating physicians ever recommended that she seek psychiatric treatment (Tr. 86). He stated he believed Plaintiff's mental abilities were very good (Tr. 93). He further stated that Plaintiff's activities are not typical of those of an individual who is disabled due to a mental impairment (Tr. 764-66).

Plaintiff testified that her daily activities included making beds, sweeping, cooking, shopping, watching television, reading, visiting friends and neighbors, playing cards, riding a bus, doing light housework, doing dishes and laundry, hanging laundry on a clothes line outside, going to the library, and babysitting her

niece's two children for about 36 hours a week (Tr. 62-7, 626, 637-40, 716). She stated that she was precluded only from heavy cleaning (Tr. 638). The ALJ determined that these activities were inconsistent with those of an individual with a disabling mental or physical impairment (Tr. 15). "The claimant's active daily life indicates that any depression she may have only minimally interferes with her activities." Id.

The ALJ may reject any physician's opinion when it is inconsistent with his reported objective clinical findings. Frey v. Bowen, 816 F.2d 507, 513 (10th Cir. 1987). He obviously accorded more weight to the opinion of Dr. Gordon than to that of Dr. Bhend.

Medical evidence indicated that Plaintiff had no difficulty dressing and undressing herself, she had good gait, range of motion, deep tendon reflexes, sensation, grip strength and ability to manipulate small objects (Tr. 698, 701-2, 708-9, 772). In fact, Plaintiff reported in her application for benefits that her treating physician told her that she could continue her normal activities around the house (Tr. 626, 637-40). The ALJ stated that there are no noted restrictions on Plaintiff's physical capabilities, and that Plaintiff's breathing problems are "mild to moderate" (Tr. 16).

It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). This Court finds that there is sufficient relevant evidence in the

record to support the ALJ's ruling that Plaintiff is able to perform her past relevant work. The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 22nd DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Braden Keith Bartholic; Carolyn Sue Bartholic, fka Carolyn Sue Davis; Beneficial Oklahoma, Inc., fka Beneficial Finance Co. of Oklahoma; Leroy Canfield; Pauline Canfield; Tulsa, Oklahoma, City-County Health Dept.; **COUNTY TREASURER**, Tulsa County, Oklahoma; **BOARD OF COUNTY COMMISSIONERS**, Tulsa County, Oklahoma,	)	ENTERED ON DOCKET DATE SEP 22 1994
	)	
Defendants.	)	CIVIL ACTION NO. 94-C-171-B

FILED
SEP 22 1994
Phil M. Lawrence, Clerk
U.S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22nd day of Oct., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LEROY CANFIELD, acknowledged receipt of Summons and Complaint on

March 2, 1994; that the Defendant, PAULINE CANFIELD, acknowledged receipt of Summons and Complaint on March 2, 1994; that the Defendant, BRADEN KEITH BARTHOLIC, was served with process a copy of Summons and Complaint on August 4, 1994; that the Defendant, CAROLYN SUE BARTHOLIC, was served with process a copy of Summons and Complaint on April 13, 1994; that the Defendant, BENEFICIAL OKLAHOMA, INC., was served with process a copy of Summons and Complaint on April 20, 1994; that the Defendant, TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, was served with process a copy of Summons and Complaint on April 13, 1994; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 3, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on February 28, 1994.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on March 21, 1994; and that the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot One (1), Block Two (2), RODDENS RESUBDIVISION OF BLOCK 3, BELFLOWER HEIGHTS ADDITION to Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on December 3, 1980, the Defendant, CAROLYN SUE DAVIS and Michael J. Davis, then husband and wife, executed and delivered to Midland Mortgage Co., a mortgage note in the amount of $21,100.00, payable in monthly installments, with interest thereon at the rate of Thirteen and One-Half percent (13.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CAROLYN SUE DAVIS and Michael J. Davis, then husband and wife, executed and delivered to Midland Mortgage Co., a mortgage dated December 3, 1980, covering the above-described property. Said mortgage was recorded on December 8, 1980, in Book 4514, Page 2117, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 26, 1990, Midland Mortgage Co., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on May 11, 1990, in Book 5252, Page 1410, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1990, the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, husband and wife, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, are indebted to the Plaintiff in the principal sum of $33,864.33, plus interest at the rate of Thirteen and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $11.28 fees for service of Summons and Complaint.

The Court further finds that the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and

Urban Development, have and recover judgment against the Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, in the principal sum of $33,864.33, plus interest at the rate of Thirteen and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.69 percent per annum until paid, plus the costs of this action in the amount of $11.28 fees for service of Summons and Complaint, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BRADEN KEITH BARTHOLIC; CAROLYN SUE BARTHOLIC; BENEFICIAL OKLAHOMA, INC.; LEROY CANFIELD; PAULINE CANFIELD; and TULSA, OKLAHOMA, CITY-COUNTY HEALTH DEPARTMENT, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, BRADEN KEITH BARTHOLIC and CAROLYN SUE BARTHOLIC fka Carolyn Sue Davis, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS
UNITED STATES DISTRICT JUDGE

APPROVED:

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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-171-B

NBK:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAYMOND D. SHRIVER,
SSN# 447-36-2582,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

Case No. 93-C-354-B

ORDER

This matter comes on for consideration of Plaintiff's Complaint seeking judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying Plaintiff's application for disability insurance benefits under the Social Security Act, as amended, 42 U.S.C. § 301 *et seq*.

Raymond D. Shriver (Plaintiff or Claimant) filed an application for social security disability benefits (hereinafter "benefits") with the Defendant on June 25, 1991. Plaintiff's application was denied on November 23, 1992, by the Administrative Law Judge (ALJ) after a hearing before the ALJ, and the Appeals Council denied the Plaintiff's request for review on February 26, 1993.

The Plaintiff filed this action on April 20, 1993, pursuant to 42 U.S.C. §405(g), seeking judicial review of the administrative decision to deny benefits under §§216(i) and 223 of the Social Security Act. Judicial review of the Secretary's

determination is limited in scope by 42 U.S.C. § 405(g). The Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938). In deciding whether the Secretary's findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir.1978).

Plaintiff sets forth three grounds for reversing the ALJ's denial of benefits:

1) The Administrative Law Judge failed to properly consider the treating physician's opinion.

2) The Administrative Law Judge failed to properly evaluate the claimant's pain.

3) The Administrative Law Judge failed to properly evaluate the claimant's residual functional capacity.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. §423(d)(1)(A). An individual

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but

> cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. *See,* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987); Talbot v. Heckler, 814 F.2d 1456 (10th Cir.1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir.1983); and Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988). The five steps, as set forth in the authorities above cited, proceed as follows:

(1) Is the claimant currently working? A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) If claimant is not working, does the claimant have a severe impairment? A person who does not have an impairment or combination of impairments severe enough to limit his or her ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) If the claimant has a severe impairment, does it meet or equal an impairment listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1. A person whose impairment meets or equals one of the impairments listed therein is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) Does the impairment prevent the claimant from doing past relevant work? A person who is able to perform work he or she has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) Does claimant's impairment prevent him or her from doing any other relevant work available

> in the national economy? A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, at 243; Talbot v. Heckler, at 1460; 20 C.F.R. § 416.920.

The ALJ followed the five-step approach set forth above and concluded:

> 1) That Plaintiff last worked on December 27, 1990, and there is no evidence that Plaintiff has engaged in substantial gainful activity since that date;
>
> 2) That Plaintiff "has severe impairments";
>
> 3) That Plaintiff does not have an impairment or a combination of impairments listed in, or medically equal to one listed in 20 C.F.R. § 404, subpt. P, app. 1.
>
> 4) That Plaintiff cannot return to his past relevant work as a coal miner; that his residual functional capacity is established at the light work level;
>
> 5) That, considering age (54), education, past work experience, and residual functional capacity, and the existence of light work opportunities existing in significant numbers in the national economy and locally, Plaintiff "was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f))".

Plaintiff argues that the ALJ did not give the proper weight to the opinion of the treating physician, Dr. Brewer. A treating physician's opinion is entitled to extra weight unless it is contradicted by substantial evidence. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th

Cir. 1987); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985); Mongeur v. Heckler, 722 F.2d 1033, 1039 (2nd Cir. 1983).

Dr. Brewer's report reflects that Plaintiff had artery bypass in 1984 which was completely successful, and a later angioplasty in December, 1991 from which he had experienced a good result. Dr. Brewer, the treating physician, reported that Plaintiff's "vessel nicely dilated and had good flow down it after dilation". Dr. Brewer's opinion that Plaintiff was probably disabled by a combination of impairments (heart and orthopedic problems) was, the ALJ concluded, inappropriate since "Dr. Brewer was a cardiologist and not an orthopedist".

The ALJ found that Plaintiff's subjective allegations of disabling pain were not credible to the extent alleged. Plaintiff testified that he has worked for 16 years as a coal miner doing heavy exertional activity; that in December, 1990 he fell off a truck, hurt his back, neck and shoulder; that his pain was constant and is severe in both hips and down his left leg; that a doctor recommended exercises, but he does not do them; that he has sharp pains and cannot walk or move his legs; that he has constant dull pain and spends a lot of time in a recliner. The ALJ concluded that Plaintiff's testimony was less credible because in part elicited by leading questions by his attorney.

Plaintiff was seen by Dr. Miller in January, 1991, who reported that Plaintiff stated that he was injured on December 27, 1990, and experienced continuing pain in his neck and shoulders, seeking treatment from his family physician, Dr. Marler in

Claremore, Oklahoma, and received injections of cortisone on three different occasions and received physical therapy three times a week; that Plaintiff takes nothing stronger than Tylenol for his back pain; that x-rays have found nothing but mild bulging, there being no appearance of neck or shoulder problems as reported by Plaintiff; that Plaintiff has no problem with appetite or sleeping because of pain, and can drive his car and take care of cattle. Dr. Miller found that the Plaintiff had decreased range of motion of the cervical spine, and of the lumbar spine, with a 12-percent impairment to his left shoulder and an impairment to his left hand and left knee.

Thereafter Plaintiff was seen by Dr. Chandy in April 1991. Dr. Chandy evaluated Plaintiff and found that he suffered from abductor tendinitis of the right and left wrist with a lumbar sprain and a bulging disk, and myofascitis of the lumbar spine; that Plaintiff later advised Dr. Chandy he felt about 25 percent improved since starting treatment in April, and that the physical therapy had been helping him with his muscle spasms being only moderate.

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind might accept to support the conclusion." Campbell v. Bowen, at 1521; Brown, at 362.

The Plaintiff has the burden to show that he is unable to return to the prior work he performed, Bernal, at 299, which burden the ALJ concluded Plaintiff sustained. Also, the Plaintiff has the burden of proving his impairment(s) prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577 (10th Cir.1984), a burden the Plaintiff has not sustained.

The ALJ found that Plaintiff's residual functional capacity was at the light work level; that Plaintiff can lift 20 pounds occasionally; that he does not appear to have a severe problem with bulging disks but cannot, however, return to his past work as a coal miner.

Vocational expert Frank Bamford testified, in response to the ALJ's hypothetical question[1], that sufficient jobs exist in the

[1] "Assume an individual of 53 years of age with an 11th grade education; and the ability to read, write and use numbers. He can perform sedentary and light work. He suffers chronic pain noticeable at all times, but he remains attentive and responsive even when on medication. He can walk 100 yards. He can sit 8 hours, with standing no more than 30 minutes. Are there jobs available which the claimant could perform?" The vocational expert testified that, commensurate with the above residual functional capacity, a hypothetical individual would have a significant number of jobs available which he could perform at the sedentary and light level. He could be a truck driver, a parking lot attendant, a grinder, buffer, a mail clerk or an assembler; such were sedentary jobs, and available in the state of Oklahoma in the following numbers: 337, 155, 215, and 1,324. In addition they were available in the many thousands nationally. There were a number of jobs available at the light level the claimant could perform. He could be a parking lot attendant, a car wash attendant, an assembler, a grinder buffer, and such jobs were available in the following numbers in Oklahoma and in the nation; 1,013, 2,500; 445, 43,000; 3,815, 1,000,000; 913, and 163,000, respectively.

light work area both locally and throughout the nation.[2]

The ALJ considered all the testimony and other medical evidence and concluded that Plaintiff could perform light work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff's final argument is that the ALJ did not properly evaluate his claim that the pain he was suffering was disabling. The ALJ found that Plaintiff's testimony as to pain was not credible and that his pain was not disabling.

The Tenth Circuit has held that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

The ALJ considered all the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d

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[2] Defendant concedes that although the ALJ also cited to the sedentary jobs enumerated by the vocational expert, that these sedentary jobs are precluded by Rule 201.10 of Table No.1, 20 C.F.R. Part 404, Subpart P, Appendix 2. However, the vocational expert further testified that Plaintiff had transferable skills to the sedentary job of light truck driver (129,000 positions nationally, 921 in Oklahoma) (Tr. 62). Thus, Rule 201.11 of Table No. 1 would permit a finding of "not disabled" based on this sedentary job.

161, 165 (10th Cir. 1987), and concluded Plaintiff's pain was not supported by the evidence to the extent alleged. The ALJ stated that the objective medical evidence showed no underlying medical condition so severe as to produce severe, disabling pain. In addition, the ALJ noted that claimant's activities included taking care of livestock and driving an automobile. Such activities are inconsistent with a claim of incapacitating pain.

Substantial evidence supports the ALJ's conclusion that Plaintiff's allegations of pain were not credible to the extent that they precluded performing light work. Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988). The ALJ can decide to believe all or any portion of any witness's testimony or evidence, including Plaintiff's testimony.

This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that the Plaintiff is able to perform light work.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff was not disabled as defined under the Social Security Act. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 22nd DAY OF September, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM HAL HARRISON,

Plaintiff,

v.

A. B. CHANCE COMPANY, a foreign corporation, and PROCESS ENGINEERING CORPORATION, a foreign corporation,

Defendants.

PROCESS ENGINEERING CORPORATION, a foreign corporation,

Defendant and Third-Party Plaintiff,

v.

ARROW ALUMINUM CASTINGS, INC., an Illinois corporation,

Third-Party Defendant.

No. 93-C-873-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) F.R.C.P., the Plaintiff, William Hal Harrison, the Defendants, A. B. Chance Company and Process Engineering Corporation, the Defendant and Third-Party Plaintiff, Process Engineering Corporation, and the Third-Party Defendant, Arrow Aluminum Castings, Inc., hereby submit their Joint Stipulation of Dismissal With Prejudice.

It is stipulated by the Plaintiff, the Defendants and the Third-Party Defendant that the Plaintiff herewith dismiss the above styled case and all causes of action therein against the Defendants, A. B. Chance Corporation and Process Engineering Corporation, with prejudice to the re-filing of same and that the Plaintiff further releases said Defendants, and the Third-Party Defendant and any and all other parties of and from any and all liability including contractual, extracontractual, tortious and exemplary liability arising out of an accident which occurred to William Hal Harrison on or about July 29, 1991, and involving the Chance Hoist which was identified and set forth in the pleadings filed in this case.

IT IS FURTHER STIPULATED by and between A. B. Chance and Process Engineering that A. B. Chance Company's Crossclaim as against the Defendant, Process Engineering Corporation, is hereby dismissed with prejudice.

IT IS FURTHER STIPULATED by Process Engineering Corporation and Arrow Aluminum Castings, Inc., that Process Engineering's Third-Party Complaint against Arrow Aluminum Castings, Inc., is dismissed with prejudice.

IT IS FURTHER STIPULATED and agreed to by all the parties and their counsel that each party will bear his or its respective costs including attorney's fees.

IN WITNESS WHEREOF, counsel for the respective parties have affixed their names hereto.

Tony Laizure, Attorney for Plaintiff, William Hal Harrison

Mark Edmondson, Attorney for A. B. Chance Company, Defendant and Cross-Claimant

John R. Woodard, III, Attorney for Process Engineering Corporation, Defendant and Third-Party Plaintiff

J. Chris Daniel, Attorney for Arrow Aluminum Castings, Inc., Third-Party Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

I.M.T.E.C. ENTERPRISES, INC., an Oklahoma corporation,

Plaintiff,

vs.

HENRY F. TEICHMANN, INC., a Pennsylvania corporation,

Defendant.

Case No. 94-C-294-BU

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, I.M.T.E.C. Enterprises, Inc., and Defendant, Henry F. Teichmann, Inc., pursuant to Rules 41(a)(1) and (c) of the Federal Rules of Civil Procedure, stipulate to the dismissal of the claims and counterclaims in the referenced action, without prejudice to refiling by either party, and each agrees to bear their respective attorneys' fees and costs in connection with the same.

DAVID R. CORDELL, OBA #11272

By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOBNA S. GOLBABA,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

ENTERED ON DOCKET
DATE SEP 22 1994

Case No. 93-C-7-B

FILED
SEP 22 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court for consideration is Plaintiff Lobna Golbaba's appeal (Docket #1), pursuant to 42 U.S.C. § 405(g), of the Administrative Law Judge's ("ALJ's") denial of Social Security benefits.

Plaintiff suffered a back injury in a automobile accident on March 30, 1989. She applied for Social Security Disability benefits on November 19, 1990. After her claim was denied, she sought judicial review. Plaintiff asserts that the Secretary's denial is not based on substantial evidence and therefore should be reversed.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id. § 423 (d)(1)(A). An individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is

> not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

Under the Social Security Act, claimants bear the burden of proving a disability, as defined by the Act, which prevents them from engaging in their prior work activity. Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988); 42 U.S.C. § 423(d)(5) (1983). Once the claimant has established such a disability, the burden shifts to the Secretary to show that the claimant retains the ability to do other work activity and that the jobs the claimant could perform exist in the national economy. Reyes, 845 F.2d at 243; Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988); Harris v. Secretary of Health and Human Services, 821 F.2d 541, 544-45 (10th Cir. 1987).

The Secretary meets this burden if the decision is supported by substantial evidence. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987); Brown v. Bowen, 801 F.2d 361, 362 (10th Cir. 1986). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant evidence "that a reasonable mind might accept to support the conclusion." Campbell, 822 F.2d at 1521; Brown, 801 F.2d at 362. The determination of whether substantial evidence supports the Secretary's decision, however,

> is not merely a quantitative exercise. Evidence is not substantial "if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion.

Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), *quoting* Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985). Thus, if the claimant establishes a disability, the Secretary's denial of disability benefits, based on the claimant's ability to do other work activity for which jobs exist in the national economy, must be supported by substantial evidence.

The Secretary has established a five-step process for evaluating a disability claim. *See* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes, 845 F.2d at 243, proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

If, at any point in the process, the Secretary finds that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

In this case, the ALJ entered a decision at the fourth level of the sequence, holding that Plaintiff can return to her past relevant work as a manufacturing systems engineer. After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings.

Plaintiff's automobile accident occurred on March 30, 1989, and her insured status, for purposes of Title II disability insurance benefits, expired on March 31, 1989. (Tr. 12, 69). Therefore, Plaintiff must prove that her disability began prior to March 31, 1989. Flint v. Secretary, 951 F.2d 264 (10th Cir. 1991). The record is replete with information about Plaintiff's disabled status that the ALJ correctly disregarded because it was generated by doctors who first saw Plaintiff about nine months after the car accident. This medical information states that Plaintiff is *currently* disabled, not that she was disabled on March 31, 1989, which is the date at issue for purposes of disability benefits. The fact that a claimant's injury or disease may get progressively worse later does not impact the analysis of whether she is disabled at the time in question. Potter v. Secretary, 905 F.2d 1346 (10th Cir. 1990). Therefore, the Court will evaluate only the medical evidence that indicates whether there is substantial evidence to

support the ALJ's finding that Plaintiff was not disabled as of March 31, 1989.

Plaintiff was hospitalized on March 30, 1989. X-rays taken at the time showed that Plaintiff's lumbar bones, joints and discs were normal (Tr. 146). She had mild tenderness in the neck and in the sacroiliac area. Deep tendon reflexes were active and equal bilaterally and sensation was normal. Plaintiff denied any pain or numbness in her legs. Straight-leg-raising tests were normal. Plaintiff was diagnosed as having lumbosacral strain (Tr. 145).

An April 1989 lumber CT scan was normal (Tr. 184). Plaintiff's treating physician at the time, Dr. Hayes, reported in June 1989, that there were no motor, sensory or reflex abnormalities in the lower extremities. Range of motion of the hip and knee was satisfactory. X-rays indicated that her lumbar vertebra were in satisfactory alignment with good preservation of the disc spaces. He diagnosed here as having lumbosacral musculoligamentous strain (Tr. 175).

An MRI taken on August 30, 1989, also was normal (Tr. 177). Dr. Hayes apparently did not consider Plaintiff to be totally disabled at that time, because he released Plaintiff to return to work as tolerated in September 1989 (Tr. 174). Plaintiff reported a month later that her pain did not awaken her at night. Id. In November 1989, EMG testing of Plaintiff's lower back, hips and lower extremities was normal (Tr. 170-71).

The ALJ stated that, as of March 31, 1989, "the claimant's lumbosacral strain did constitute a severe impairment which

prevented her from engaging in work activities requiring medium or greater physical demands." However, he determined that she retained the residual physical capacity to perform a full range of light work (Tr. 14). Plaintiff's past relevant work as a manufacturing systems engineer required sedentary physical demands, meaning that Plaintiff, as of March 31, 1989, retained the capacity to return to her past work. Id.

After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment, as of March 31, 1989, did not prevent her from performing her past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991).

While it is regrettable that Plaintiff apparently developed rheumatoid arthritis in her back and major depression,[1] this does not change the fact that Plaintiff was not disabled as of March 31, 1989, the expiration date of her Title II disability benefits. This Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that Plaintiff was able to perform her past relevant work as of the pertinent date of March

[1]The severity of which the Court does not consider at this time.

31, 1989. The Secretary's decision, therefore, is hereby AFFIRMED.

IT IS SO ORDERED THIS 22nd DAY OF SEPTEMBER, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1994

Clerk

KATHRINE JOHNSON,

Plaintiff,

vs.

WOODY DESIGN ASSOCIATES and SUSIE WOODY, individually,

Defendants.

Case No. 94-C-644-B

ENTERED ON DOCKET

DATE SEP 21 1994

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Kathrine Johnson and Defendants Woody Design Associates and Susie Woody ("Defendants") hereby stipulate and agree that this action should be dismissed with prejudice. It is further stipulated by Plaintiff and Defendants that all parties will be responsible for their respective costs and attorneys' fees.

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